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85-55

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether, in this class action under 42 U.S.C. 405(g) challenging the weight the Secretary accords to a person's allegations of pain in determining whether he is entitled to disability benefits under the Social Security Act, the district court correctly included within the class numerous claimants who had not exhausted their administrative remedies and therefore had not obtained a "final decision" of the Secretary on their individual claims for benefits.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services.

The named respondents are Lorraine Polaski and Patrick Blaschko. These two respondents are representatives of the following class certified by the district court (Pet. App. 51a-52a):

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska, Iowa, or Arkansas,
>
> a) who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical vocational grounds; and
>
> b) who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and
>
> c) who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984, provided however that,
>
> > (1) as to those who are residents of Arkansas and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class includes only (a) those who are pursuing or will pursue timely judicial appeals and (b) those who are pursuing timely administrative appeals at the Administrative Law Judge or Appeals Council level, and (c) those who received or will receive an

adverse decision at the Administrative Law Judge or Appeals Council level on or after February 20, 1984;

(2) as to those who are residents of Arkansas and who have been terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after February 12, 1983; and

(3) as to those who are residents of Iowa and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class also includes those who have received an adverse decision at any level of the administrative review process on or after November 26, 1983; and

(4) as to those who are residents of Iowa and who have been or will be terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after January 13, 1982;

d) provided, further, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.

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MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 751 F.2d 943, and the July 17, 1984 order of the court of appeals approving the parties' settlement agreement as to one issue (Pet. App. 27a-31a) is reported at 739 F.2d 1320. The April 17, 1984 order of the district court certifying the plaintiffs' class and entering a temporary restraining order (Pet. App. 32a-45a) is reported at 585 F. Supp. 997, and the April 27, 1984 order of

the district court amending the class certification and entering a preliminary injunction (Pet. App. 46a-81a) is reported at 585 F. Supp. 1004.

JURISDICTION

The judgment of the court of appeals (Pet. App. 82a) was entered on December 31, 1984. The order denying the Secretary's petition for rehearing (*id.* at 83a) was entered on April 16, 1985, and an amended order was entered on April 19, 1985 (*id.* at 84a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), and Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799, are reproduced at Pet. App. 85a-89a.

STATEMENT

This is an Eighth Circuit-wide class action challenging the weight accorded by the Secretary of Health and Human Services to a claimant's allegations of pain in determining whether he is entitled to disability benefits under Title II or Title XVI of the Social Security Act. In this petition, we seek review of the court of appeals' requirement that the Secretary reopen decisions of thousands of applicants for disability benefits who did not exhaust their administrative remedies and obtain a "final decision" of the Secretary on their claims for benefits, which is a prerequisite to jurisdiction under 42 U.S.C. 405(g). This question concerning exhaustion of administrative remedies is similar to that presented in *Heckler*

v. *City of New York*, petition for cert. pending, No. 84-1923 (filed June 7, 1985).[1]

1. Under both Title II and Title XVI of the Social Security Act, the term "disability" is defined to mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that can be expected to result in death or to last for 12 months. 42 U.S.C. 423(d)(1)(A) and 1382c(a)(3)(A). The impairment must be one that "results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3) and 1382c(a)(3)(C). See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

Implementing regulations provide that a claimant will not be found to be disabled under these statutory standards on the basis of his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." 20 C.F.R. 404.1529, 416.929. In Social Security Ruling (SSR) 82-58, the Social Security Administration (SSA) explained that the decisionmaker must consider the impact of the pain or other symptoms on the claimant's residual functional capacity to do his previous work or other substantial gainful work that exists in the national economy. SSR 82-58 required a consideration of both subjective and objective factors in making this assessment, including the claimant's allegations concerning the frequency and duration of the pain, precipitating and aggravating factors, the effect on the claimant's daily activities, the effect of

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[1] We are sending a copy of our petition in *City of New York* to counsel for respondents.

medication, and recorded observations about the pain by examining physicians and SSA personnel. See Pet. App. 10a-14a, 29a-30a, 58a.

2.a. Respondent Lorraine Polaski received disability benefits under Title II of the Social Security Act beginning in 1979 (Pet. App. 33a). Her eligibility subsequently was reviewed, and the state agency determined that her disability had ceased as of June 1982, because she was then able to engage in substantial gainful activity. Polaski was so informed in an initial determination dated July 26, 1982 (P. Tr. 166).[2] That decision was sustained on reconsideration (P. Tr. 169), and an Administrative Law Judge (ALJ) rendered a decision to the same effect after a hearing (P. Tr. 23-30). The ALJ stated that Eighth Circuit precedent permits a finding of disability based on the claimant's subjective complaints of pain if there is no factual basis in the record for rejecting the claimant's testimony (P. Tr. 28). But the ALJ stressed that symptoms, including pain, are insufficient to establish disability unless medical findings or signs show that there is a medical condition that could reasonably be expected to produce those symptoms, and that the mere assertion of pain does not foreclose the ALJ from finding that the claimant's complaints lack credibility to establish an impairment of the requisite severity (*ibid.*). After reviewing the evidence under these principles, the ALJ concluded that "the record does not establish the existence of pain of such intensity and frequency so as to preclude [Polaski] from engaging in all

[2] "P. Tr." refers to the transcript of the administrative record in respondent Polaski's case that was filed by the Secretary in district court pursuant to 42 U.S.C. 405(g). "B. Tr." refers to the transcript in respondent Blaschko's case.

types of competitive work activity" and that Polaski could work in a "relatively low-stress, 'unskilled' work environment" (*ibid.*). The Appeals Council denied review of the ALJ's decision on November 28, 1983 (P. Tr. 6-7).

After thus exhausting her administrative remedies, respondent Polaski filed a civil action on January 20, 1984 in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. 405(g), seeking judicial review of the Secretary's final decision that her disability had ceased. On April 3, 1984, she sought to amend the complaint to represent a class of claimants in the Eighth Circuit. Polaski alleged that the Secretary was "nonacquiescing" in Eighth Circuit case law (i) that addressed the consideration of subjective complaints of pain and (ii) that, in Polaski's view, required the Secretary to find improvement in a recipient's medical condition before terminating his disability benefits (Pet. App. 32a-33a).

b. On April 17, 1984, the district court granted Polaski's motion to amend the complaint, certified an Eighth Circuit-wide class, and entered a Circuit-wide temporary restrainting order (Pet. App. 32a-45a).[3] The class is defined to include all persons re-

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[3] The district court also granted the motion by respondent Patrick Blaschko to intervene (Pet. App. 34a). Blaschko, like Polaski, was a prior recipient of disability benefits whose benefits were terminated. As in Polaski's case, the ALJ expressly cited Eighth Circuit precedent concerning the evaluation of pain, but concluded on the basis of all of the evidence that Blaschko's pain was not of sufficient severity to preclude him from engaging in substantial gainful activity (B. Tr. 14-16). The Appeals Council denied Blaschko's request for review on January 17, 1983 (B. Tr. 3-4), and he thereafter filed an individual action for judicial review in the United States

siding in the Eighth Circuit who have been or will be notified that their applications for disability benefits have been denied or that their benefits have been terminated; "who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved"; and "who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984" (Pet. App. 51a-52a). The latter date was selected to comply with the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision on his claim for benefits (Pet. App. 23a-24a n.4).[4]

District Court for the District of Minnesota on March 15, 1983, pursuant to 42 U.S.C. 405(g). *Blaschko* v. *Heckler*, Civil No. 4-83-233. Blaschko's action was assigned to a different judge (Murphy, J.) than the judge who decided the instant case (Lord, C.J.).

By order dated March 7, 1984, the district court remanded Blaschko's individual case to the Secretary for further proceedings in accordance with a magistrate's report dated February 23, 1984, which concluded that the ALJ had incorrectly discredited Blaschko's subjective complaints of pain. Thus, Blaschko's own individual action under 42 U.S.C. 405(g) had already been resolved when the district court permitted him to intervene in the instant case. We have been informed by HHS that, after the remand, the Appeals Council rendered a decision fully favorable to Blaschko on January 12, 1985.

[4] The district court adopted beginning dates other than January 30, 1984 for class members in Arkansas and Iowa, concluding that the running of the 60-day period had been tolled by the filing of separate class actions in those States (Pet. App. 50a & n.1, 51a-52a). See pages II-III, *supra*.

In an order dated April 27, 1984, the district court rejected the Secretary's contention that the class could not include any persons who had not exhausted their administrative remedies, as required by 42 U.S.C. 405(g). The court reasoned that judicial "waiver" of this requirement was appropriate because, in its view, members of the class otherwise would suffer irreparable harm and it would be "futile and inefficient" to require exhaustion (Pet. App. 49a). The court also concluded that it could exercise mandamus jurisdiction under 28 U.S.C. 1361 (*ibid.*).

The district court then entered a sweeping "preliminary injunction" that directed the Secretary: (i) to notify all new-applicant class members who then had administrative appeals pending that they were entitled to have their claims considered under what the court defined as the "proper" pain standard, to submit additional evidence under that standard, to receive an expedited decision within 60 or 90 days, and to receive interim benefits if a decision was not rendered within the applicable time period; (ii) to notify all class members whose applications had been denied and who did *not* have a timely appeal pending that they were entitled to have their claims reopened and readjudicated under the same conditions; and (iii) to reopen the claims of all class members in the latter category whose files were still located at an SSA district office or Appeals Council, whether or not the individual claimant requested reopening (Pet. App. 75a-77a, 80a). The court ordered similar injunctive relief as regards class members whose benefits had been terminated, requiring the Secretary, inter alia, to notify class members that they could have their claims reopened and reconsidered under what the court determined to be the "proper" pain standard and under an appropriate "medical im-

provement" standard for determining when a recipient's disability has ceased (*id.* at 73a-75a, 79a-80a).

3. The Secretary appealed the district court's order entering the preliminary injunction.[5] Because the Secretary argued on appeal that she had been applying standards for the evaluation of pain that were consistent with Eighth Circuit precedent, the court of appeals deferred its decision in order to allow the parties an opportunity to reach agreement on the appropriate standards (Pet. App. 28a). The parties thereafter did reach agreement (*id.* at 29a-30a), and by order dated July 17, 1984 (*id.* at 27a-31a), the court of appeals approved that agreement as a correct restatement of Eighth Circuit precedent on the subject.[6]

4. The court of appeals issued its decision on the remaining issues in the case on December 31, 1984

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[5] The court of appeals granted a stay pending appeal (Pet. App. 28a).

[6] The agreement stated that symptoms, such as pain, are the individual's own perceptions of the effects of his impairment and that such symptoms must be considered in terms of any restrictions they impose beyond those demonstrated by objective physical manifestations (Pet. App. 29a). The agreement further stated that direct medical evidence of the relationship between the impairment and the degree of a claimant's subjective complaints need not be produced and that the adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them (*id.* at 29a-30a). The agreement concluded that the absence of an objective medical basis to support the severity of the complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints, and that the adjudicator must give full consideration to all of the evidence, including the claimant's prior work record, his daily activities, the frequency and intensity of the pain, precipitating and aggravating factors, the effects of medication, and resulting functional restrictions (*id.* at 30a).

(Pet. App. 1a-26a). In the meantime, Congress had enacted the Social Security Disability Benefits Reform Act of 1984 (Pub. L. No. 98-460, 98 Stat. 1794), which had a direct bearing on both the "medical improvement" and "pain" issues.

a. In Section 2 of the 1984 Act (98 Stat. 1794), Congress enacted detailed statutory standards for determining whether a person's disability benefits should be terminated, and it required the cases of individual class members in certified class actions raising the "medical improvement" issue to be remanded to the Secretary for reconsideration under the new standards. The court of appeals concluded that all of the class members in the instant case who previously had been receiving benefits but whose benefits were terminated were covered by the special remand provisions of the 1984 Act, and it therefore remanded the cases of these class members to the Secretary for consideration under Section 2 of the 1984 Act (Pet. App. 5a-10a). This disposition was consistent with this Court's similar remand orders in *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984), and *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984).[7] The individual case of respondent Polaski, the class representative, was covered by the remand provisions of the 1984 Act.

b. There remained, then, the question of the proper disposition of the claims of the class members who had not previously been receiving disability benefits

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[7] As the court of appeals held (Pet. App. 13a), any of these terminated class members are entitled to raise the "pain" issue in the course of the administrative reconsideration of their claims. See the Supplemental Brief (at 9 n.9) filed on behalf of the Secretary on October 23, 1984 in *Heckler* v. *Kuehner, supra.*

and who therefore were not covered by the special remand provisions in Section 2 of the 1984 Act. As to these class members (the new applicants), the instant case raised only the "pain" issue.

In Section 3 of the 1984 Act (98 Stat. 1799 (Pet. App. 87a-89a)), Congress enacted new statutory standards for the consideration of pain. The Secretary argued (Supp. Br. 13-15; Supp. Reply Br. 10-11) that Section 3 of the 1984 Act superseded prior law and that she should be permitted to interpret and apply the new statutory "pain" provisions in the first instance, either by regulation or in the course of the administrative adjudication of claims presenting that issue. Nevertheless, the court of appeals chose to reach the question of the meaning of Section 3 of the 1984 Act and concluded that it did not affect the July 17, 1984 settlement agreement between the parties because, in the court's view, the 1984 Act did not depart from prior law embodied in that agreement (Pet. App. 16a-17a).

The majority, over Judge Gibson's dissent (Pet. App. 25a-26), also rejected the Secretary' contention that the court in any event had no jurisdiction to resolve the "pain" issue because the new-applicant class members had not exhausted their administrative remedies, as required by 42 U.S.C. 405(g) (Pet. App. 18a-25a). Following the Second Circuit's reasoning in *City of New York* v. *Heckler*, 742 F.2d 729 (1984), petition for cert. pending, No. 84-1923 (see Pet. App. 20a, 23a), the court of appeals held that judicial "waiver" of the exhaustion requirement was appropriate under what it termed a "pragmatic analysis" of "the claimants' interest in judicial review at that point in the proceedings" and "the relative harm to the agency's administrative process" (*id.* at 20a).

The court of appeals relied on a number of factors. First, it believed that the class members would suffer "potentially irreparable harm" because a denial of benefits could result in financial hardship and cause them to become anxious, depressed, or despairing (Pet. App. 20a-21a). Second, the court reasoned that deference to the Secretary's judgment that full exhaustion is required was "inappropriate" because respondents contended the administrative adjudicators at every level had evaluated complaints of pain under an improper standard and because the Secretary acknowledged that "some adjudicators" had misinterpreted her policies (*id.* at 21a-22a). Third, the court believed that it would be "unfair" not to require reopening of the claims of class members that had been denied prior to July 17, 1984, because claims considered after that date would be decided under the proper standard embodied in the settlement agreement (*id.* at 22a-23a). Fourth, the court believed that deference to the agency's expertise was "unnecessary and inappropriate" because the parties' stipulation on pain and the 1984 Act had resolved the controversy over the pain standard (*id.* at 23a). Fifth, although the court conceded that the legal issue concerning the evaluation of pain, unlike the issue in *Mathews* v. *Eldridge*, 424 U.S. at 330, was not "wholly collateral" to the class members' claims for benefits, the court believed it was sufficient that the "focus" of the argument on behalf of the class was "substantially" collateral to their claims for benefits (Pet. App. 23a).[8]

[8] The court of appeals directed the Secretary to send a notice to the new-applicant class members informing them of their right to request reopening, but eliminated the district court's requirements that readjudication be accomplished within fixed

c. The Secretary's petition for rehearing en banc on the exhaustion issue was denied, with three judges dissenting (Pet. App. 84a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals dispensing with the exhaustion prerequisite to jurisdiction under 42 U.S.C. 405(g) is flatly inconsistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). The court's ruling on the exhaustion issue also directly conflicts with the decision of the Fourth Circuit in an identical class action challenging the manner in which pain is considered. *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (1985). The result of the decision below is to require reopening of administrative decisions throughout the Eighth Circuit that the claimants involved allowed to become final and binding when they failed to seek further administrative review within the 60 days permitted by governing regulations. The Department of Health and Human Services estimates that there are approximately 9,000 such cases. The decision below therefore plainly warrants review by this Court.

The exhaustion issue in this case is similar to that presented in *Heckler* v. *City of New York*, petition for cert. pending, No. 84-1923, in which the Court recently granted a partial stay pending certiorari. No. A-972 (July 1, 1985). Related exhaustion issues also are presented in the Secretary's direct appeal in *Heckler* v. *Owens*, appeal docketed, No. 84-1905

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deadlines and that the Secretary pay interim benefits to class members whose claims were not readjudicated within this period (Pet. App. 24a-25a).

(June 5, 1985). We do not believe it is necessary for the Court to grant plenary review here as well. Instead, we suggest that the Court hold the petition in this case pending its disposition or decision in *City of New York* and *Owens*. We therefore refer the Court to the discussion of the exhaustion requirement in the certiorari petition (at 16-23) in *City of New York* and add the following observations:

1. In the petition (at 20-22) in *City of New York*, we explain that where, as here, the Secretary has not waived full exhaustion of administrative remedies, the Court has recognized only one exception to the exhaustion requirement. That exception applies where the legal issue the claimant raises is "entirely" or "wholly" collateral to the merits of his substantive claim for benefits and he has advanced a colorable argument that he will suffer irreparable injury if judicial review is not immediately available. *Mathews* v. *Eldridge*, 424 U.S. at 330-332; *Heckler* v. *Ringer*, slip op. 14-15. That lone exception plainly has no application here. The court of appeals conceded that the legal issue respondents raise concerning the evaluation of pain, unlike the asserted right to a pretermination hearing in *Eldridge*, is not "wholly collateral" to the merits of the class members' claims for benefits (Pet. App. 23a); to the contrary, that issue goes to the very heart of their entitlement to benefits under the statutory definition of "disability" and implementing regulations. Nor have respondents identified any distinct and irreparable injury that might result from the Secretary's allegedly erroneous evaluation of pain. They allege only the sorts of hardship any claimant for disability benefits might suffer if his application is denied on the merits at a preliminary stage of the administrative review pro-

cess. That obviously is not a basis for dispensing with the "final decision" requirement in 42 U.S.C. 405(g). Indeed, the single class representative, respondent Polaski, *did* exhaust her administrative remedies and obtain the requisite final decision of the Secretary before seeking judicial review. See also note 3, *supra*. There is no reason why the unnamed class members should be excused from doing the same.

2. The error of the court of appeals in the instant case is, in one respect, more egregious than that of the Second Circuit in *City of New York*. The court below *endorsed* the Secretary's overall approach to the evaluation of complaints of pain, as reflected in the settlement agreement the court approved on July 17, 1984. As a result, there was no reason to assume that a significant percentage of disability claims based on allegations of pain had been decided incorrectly; rather, there were, at most, only occasional misapplications of the Secretary's concededly proper approach in an unspecified number of administrative decisions affecting particular individual claimants. Such isolated errors are precisely the sort that should be left to correction by the Secretary in further administrative proceedings on the particular claims involved. *Salfi*, 422 U.S. at 765-766; *Ringer*, slip op. 14-16. Yet the court of appeals has required the Secretary to provide for the readjudication of *all* administrative decisions in the Eighth Circuit during the relevant time period in which the applicant alleged disabling pain and the application was denied on medical or medical vocational grounds (Pet. App. 51a).

3. Another objectionable result of the erroneous exhaustion holding in this case is that the court of appeals proceeded to render a decision regarding the

interpretation of a statutory provision—Section 3 of the 1984 Disability Benefits Reform Act—before the Secretary even was given an opportunity to interpret and apply that statutory provision in the first instance, either by regulation or by the administrative adjudication of particular claims for benefits in which the pain issue was raised. If the court below had respected the controlling precedents of this Court on the exhaustion issue, it instead would have remanded the case to the district court with instructions to dismiss for lack of jurisdiction as regards the new-applicant class members, without reaching the legal issue concerning the evaluation of pain.[9] The correct interpretation of the newly enacted statutory provision then could have been resolved at a later date on judicial review under 42 U.S.C. 405(g) of the Secretary's "final decision" denying a class member's claim for benefits, if the pain issue ultimately proved to have any bearing on the Secretary's resolution of that claim.

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[9] The court of appeals could not have resolved that issue in the context of the claims of the two named respondents, since Blaschko's individual case already had been remanded and Polaski's case was required to be remanded under Section 2 of the 1984 Act without reaching the merits of the pain issue. See note 7, *supra*; *Heckler* v. *Kuehner*, *supra*. The court of appeals acknowledged that the unnamed members of the class had not exhausted their administrative remedies (Pet. App. 19a).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's disposition in *Heckler* v. *City of New York*, No. 84-1923, and *Heckler* v. *Owens*, No. 84-1905. If the Court grants the petition for a writ of certiorari in this case and remands for further consideration in light of those cases, it should vacate the judgment below except insofar as it addresses the cases of the terminated class members under Section 2 of the Social Security Disability Benefits Reform Act of 1984.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5085

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, SECRETARY
OF HEALTH AND HUMAN SERVICES, APPELLANT

Appeal from the United States District Court
for the District of Minnesota

Submitted: June 12, 1984

Filed: December 31, 1984

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

HEANEY, CIRCUIT JUDGE.

The Secretary of Health and Human Services appeals from a district court order granting a prelimi-

nary injunction to a class of plaintiffs seeking social security disability benefits. For the reasons set forth below, we remand for further proceedings.

I. BACKGROUND.

For several months a dispute has raged in this and other Circuits on the question of whether the Secretary of Health and Human Services (Secretary) has been properly construing the Social Security Act, particularly with respect to persons who claim to be disabled because of pain and with respect to persons whose disability benefits have been terminated. On January 20, 1984, Lorraine Polaski filed a complaint in federal district court for the District of Minnesota, seeking review of the termination of her social security disability benefits by the Secretary. She later amended her complaint to pursue the case as a class action on behalf of similarly situated disabled persons within the Eighth Circuit. The amended complaint alleges: first, that the Secretary is not following Eighth Circuit law in that she is terminating disability benefits absent evidence demonstrating either that the claimant's condition has materially improved or that the original decision granting benefits was erroneous; and second, that the Secretary is not following Eighth Circuit law in that she is requiring that objective medical evidence fully corroborate a disability claimant's allegations of pain and other subjective complaints.

On April 27, 1984, the district court issued a preliminary injunction and a class certification order. It determined that the Secretary was nonacquiescing in Eighth Circuit decisions with respect to the proper standard for evaluating pain and other subjective complaints, and with respect to the proper standard

for terminating disability benefits. The court enjoined the Secretary from denying or terminating disability benefits unless she followed this Court's decisions regarding these standards. It also provided for reconsideration of the claims of persons within the class under the designated standards.

On May 1, 1984, the Secretary sought an emergency stay of the preliminary injunction pending appeal to our Court. The district court denied that motion the next day. The Secretary filed a notice of appeal on May 15, 1984. On May 25, 1984, this Court granted a temporary stay pending appeal. We heard oral argument on June 12, 1984.

In her brief and at oral argument, the Secretary asserted that she had been applying Eighth Circuit cases concerning the standard for evaluating allegations of pain and other subjective complaints. The appellants took a contrary view, but in light of the Secretary's assertion, we deferred a decision to give the parties a chance to reach an agreement on the issue.

On July 11, 1984, the Justice Department notified this Court that the parties reached a settlement, agreeing to the relevant standard for evaluating pain cases.

On July 17, 1984, this Court entered an order in which we stated that the settlement agreement set forth a correct statement of the law concerning pain cases, to be followed in all administrative and judicial proceedings within the Eighth Circuit. We required the Secretary to transmit the agreed-upon language to adjudicators within the Eighth Circuit responsible for determining disability, including personnel in state and district offices, and personnel within the Social Security Administration, administrative law

judges (ALJs), and the Appeals Council. On July 18, the Secretary disseminated the approved language to all adjudicators.

Meanwhile, on June 27, 1984, this Court held in *Rush v. Secretary of Health and Human Services*, 738 F.2d 909 (8th Cir. 1984), that "in a disability-termination proceeding, there is a presumption that a claimant who has previously been determined to be disabled remains disabled." *Id.* at 915-16 (footnote omitted). We also held that the Secretary must bear the initial burden to come forward with evidence showing that there is a legitimate reason to re-evaluate the claimant's right to receive benefits. We explained that the Secretary could meet this burden

> by showing that there was clear and specific error in the prior determination or by producing new evidence that the claimant's medical condition has improved, that the claimant has benefited from medical or vocational therapy or technology, or that the claimant's condition is not so disabling as originally supposed.

Id. at 916.

On September 13, 1984, this Court entered an order directing the Secretary of Health and Human Services to inform the Clerk of the United States Court of Appeals for the Eighth Circuit on or before September 25, 1984, whether she intended to non-acquiesce in the Court's decision in *Rush*.

On September 19, 1984, Congress passed the Social Security Disability Benefits Reform Act of 1984 (1984 Act), Pub. L. No. 98-460, 98 Stat. 1794 (1984). The President signed the Act on October 9, 1984, and it became effective on that date. Among other things, the Act sets forth the standard for reviewing disability benefits terminations, and the

standard for evaluating pain and other subjective complaints. It also establishes the procedures to be followed in pending and future cases relating to medical improvement and pain.

II. TERMINATION CASES WHERE MEDICAL IMPROVEMENT IS ALLEGED.

The 1984 Act details the procedure to be followed concerning persons whose benefits have been terminated by the Secretary. It provides in pertinent part that the Secretary may terminate the benefits of persons who have previously been found disabled only if there is substantial evidence which demonstrates that:

> (A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and
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> (B) * * * the individual is now able to engage in substantial gainful activity.[1]

Id. § 2(a).

This determination is to be made

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[1] The 1984 Act also provides several other grounds for termination: (1) where the claimant has benefited from advances in medical or vocational therapy or technology; (2) where the claimant's impairment is shown to be not as disabling as orginally determined, based on new or improved diagnostic techniques; or (3) where the prior determination of disability is shown to be in error. In each case there must also be substantial evidence that the individual is now able to engage in substantial gainful activity. Social Security Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(a), 98 Stat. 1794 (1984).

> on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled.

Id.

This language makes clear that the portion of our *Rush* decision that recognized a presumption of continuing disability and required the Secretary to bear the initial burden of producing evidence indicating a legitimate reason to reevaluate the claimant's disability no longer stands.

The Act provides that the court shall remand to the Secretary the cases of persons whose benefits have been terminated and who were unnamed members of a class action relating to medical improvement pending as of September 19, 1984. The Secretary is to notify these persons that they may request a review of their cases under the 1984 Act within 120 days of receiving this notice. The claimant may also request interim benefits pending the initial redetermination. The Secretary's decision as to each claimant is subject to further administrative and judicial review, if the claimant requests this review in a timely manner. *Id.* § 2(d)(3). The 1984 specifies that the decision by the Secretary is to be

> regarded as a new decision on the individual's claim for benefits, which supersedes the final decision of the Secretary. The new decision shall be subject to further administrative review and to judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of section 205 of the Social Security

> Act and regulations issued by the Secretary in conformity with such section.

Id. § 2(d)(4).

Finally, the 1984 Act limits class action litigation over the medical improvement standard by providing that:

> No class in a class action relating to medical improvement may be certified after September 19, 1984, if the class action seeks judicial review of a decision terminating entitlement (or a period of disability) made by the Secretary * * * prior to September 19, 1984.

Id. § 2(d)(5).

In light of the action taken by Congress, there are only two questions remaining in this litigation concerning claimants who allege that their disability benefits have been erroneously terminated because of the improper application of the medical improvement standard: 1) should the pending class action be dismissed upon remand to the Secretary, and 2) if not, what portions of the district court's order should be implemented in light of the 1984 Act?

The Secretary maintains that, after an individual case or the case of an unnamed class member is remanded to the Secretary, there is no further role for any court, and the 1984 Act thus requires that the case be dismissed. The plaintiffs contend that the 1984 Act does not require dismissal of the case and that the district court should continue to supervise the case after remand to the Secretary.

The 1984 Act requires that all claims including those of named and unnamed class members be initially resolved by the Secretary. *Id.* § 2(d). The conference agreement states that the 1984 Act "pro-

vides that the existing certified classes will be covered by the new standard in order to resolve the existing controversy over the medical improvement issue in the courts." 130 Cong. Rec. H9828 (daily ed. Sept. 19, 1984). In accordance with this objective, we dismiss the class action concerning the medical improvement cases. We note, however, that the disability benefits of more than 400,000 persons were terminated by the Secretary. Many of those terminated have sought review of their individual claims in this and other Circuits. At least two class actions including the instant one have been commenced in this Circuit. It is now conceded that the benefits of many persons were improperly terminated. In light of this history, the Secretary has a responsibility to those who have sought the protection of this Court to insure that the claims of those who were terminated and who seek review and reinstatement of benefits are handled promptly and in accordance with the letter and the spirit of the 1984 Act.

The plaintiffs contend that, where the statute and the preliminary injunction conflict with respect to the nature and the timing of relief, the preliminary injunction should prevail. First, § 2(d)(2) of the 1984 Act provides that the claims of class members with individual appeals pending in court be automatically remanded. The district court allowed class members to choose either to remand to the Secretary, or have their cases adjudicated by the court with jurisdiction over their appeals. The plaintiffs argue that class members should, in the interest of judicial economy, be allowed the latter option. They also argue that, because many claimants have raised issues in addition to medical improvement (including the pain issue) which may be dispositive, we should

permit the courts to resolve these cases without remand. They cite the delay in the administrative process as requiring this result. We recognize that there is merit to these contentions, but Congress has spoken and we cannot disregard its mandate to remand these cases to the Secretary. Second, even though the statute provides that class members who are not pursuing administrative or judicial appeals must affirmatively request readjudication of their claims after receiving notice, the plaintiffs argue that these claims should be readjudicated automatically as provided by the preliminary injunction. Again, notwithstanding the plaintiffs' analysis of the relative burdens and benefits of automatic readjudication, this balancing decision has been conducted by Congress, and it must be respected.

At least two practical aspects of the district court's preliminary injunction remain which have not been addressed by Congress. Specifically, while the 1984 Act does provide that the Secretary must prescribe regulations implementing the Act within six months, the Act is silent as to the timing and the form of notice to be given to class members concerning their right to readjudication and reinstatement of benefits. The timetable for notifying class members was certainly a concern of the Congress. The conference report states that:

> The conferees recognize that there will be considerable administrative difficulty in identifying and notifying individuals who are eligible to have their cases redetermined as a result [of] their being unnamed [sic] members of class actions certified prior to September 19, 1984. Notwithstanding the administrative difficulty of this task, the conferees expect the Secretary of Health

> and Human Services to act expeditiously in notifying these individuals of the provisions of this act which are applicable to them.

130 Cong. Rec. H9828 (daily ed. Sept. 19, 1984).

In light of this conference report and in light of the fact that the Secretary will have to notify not only the class members of this class action, but persons similarly situated throughout the United States, we cannot mandate that the specific time periods in the district court's order be followed. Again, we emphasize, however, that significant delays have already occurred and that the Secretary should act promptly.

The Secretary apparently does not object to the form or content of the notices. The Act leaves it to the Secretary to notify class members about their right to readjudication of their claims; while the notice provisions approved by the district court are not mandatory, the Secretary may wish to use them to the extent they are consistent with the Act.

III. PAIN CASES.

The July 11, 1984, stipulation signed by the Secretary and the plaintiffs with respect to evaluation of pain read as follows:

> A claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment. Symptoms such as pain, shortness of breath, weakness, or nervousness are the individual's own perceptions of the effects of a physical or mental impairment(s). Because of their subjective characteristics and the absence of any reliable techniques for measurement, symptoms' (especially pain)

are difficult to prove, disprove, or quantify. *As a result of this difficulty, some adjudicators have misinterpreted the Secretary's policies as enunciated in SSR-82-58.* [Emphasis added.]

In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain. The example should not be construed to be inconsistent with the text of SSR-82-58 which states in part:

> The effects of symptoms must be considered in terms of any additional physical or mental restrictions they may impose beyond those clearly demonstrated by the objective physical manifestations of disorders. Symptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective and medical findings alone.

While the claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the

testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant's daily activities;

2. the duration, frequency and intensity of the pain;

3. precipitating and aggravating factors;

4. dosage, effectiveness and side effects of medication;

5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints *solely* on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole. [Emphasis in original.]

Polaski v. Heckler, 739 F.2d 1320, 1321-22 (8th Cir. 1984).

On July 17, 1984, this Court issued an order approving the language as a correct statement of the law under the Social Security Act and of the case law in the Eighth Circuit. On July 18, 1984, the Secretary disseminated the approved language to all adjudicators—state district offices, state DDS offices, and ALJs in the Eighth Circuit. It disseminated the same information to the Appeals Council.

Thereafter, this Court permitted the parties to file supplemental briefs to explain how the agreement on the pain standard, as approved by this Court,

affected this litigation. The government's brief stated:

> The approved language is simply a clarification of SSR 82-58, which is the Secretary's instructional ruling on the evaluation of pain and other subjective complaints. This point is made clear by the specific reference in the approved language to SSR 82-58 *and the fact that errors in cases involving pain may have been the result of misinterpretations of the SSR and specifically Example No. 2 in the SSR.* * * * ("[S]ome adjudicators have misinterpreted the Secretary's policies enunciated in SSR-82-58"; and "some adjudicators may have misinterpreted Example No. 2 in SSR-82-58").
>
> That the approved language is a clarification of SSR 82-58 is further reinforced by the fact that the Secretary's regulations and SSR 82-58 require that pain and other subjective complaints be evaluated according to the following factors:
>
> 1. the claimant's daily activities;
>
> 2. the duration, frequency and intensity of the pain;
>
> 3. precipitating and aggravating factors;
>
> 4. dosage, effectiveness and side effects of medication;
>
> 5. functional restrictions.
>
> See SSR 82-58, Addendum D to Opening Brief at 3. The approved language identifies the same factors and similarly requires their considera-

> tion in the evaluation of subjective complaints of pain. * * *
>
> In sum, the approved language is merely a restatement of the standard which the Secretary has been following all along. [Emphasis added, citations omitted.]

On September 19, 1984, Congess passed the Social Security Disability Benefits Reform Act of 1984.[2] That Act amended the existing law with respect to evaluation of pain. It provides:

> EVALUATION OF PAIN
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> SEC. 3. (a)(1)[.] Section 223(d)(5) of the Social Security Act is amended by inserting after the first sentence the following new sentences: "An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably

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[2] The existing statute stated only that: "An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." 42 U.S.C. § 423(d)(5).

be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability."

(2) Section 1614(a)(3)(H) of such Act (as added by section 8 of this Act) is amended by striking out "section 221(h)" and inserting in lieu thereof "sections 221(h) and 223(d)(5)".

(3) The amendments made by paragraphs (1) and (2) shall apply to determinations made prior to Jauary 1, 1987.

Id. § 3(a).

The conference report summarized Congress's understanding of present law with respect to evaluation of pain as follows:

There is no statutory provision concerning the evaluation of pain (or the use of subjective allegations of pain) in determining eligibility for disability benefits. The definition of disability requres that the person be unable to work by reason of a "medically determinable impairment"—one which results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

By regulation, subjective allegations of symptoms of impairments, such as pain, cannot alone be evidence of disability. There must be medical signs or other findings which show there is a medical condition that could be reasonably ex-

> pected to produce those symptoms and that is severe enough to be disabling.

130 Cong. Rec. H9828-29 (daily ed. Sept. 19, 1984).

The conference report then stated:

> The statutory language providing for an interim standard for evaluation of pain is amended to more accurately reflect current policies.

Id. at H9829.

The Chairman of the Social Security Subcommittee, Congressman J. J. Pickle, commenting on the statutory provisions concerning pain, stated:

> With reference to pain, the conference agreement puts present regulatory policy into statute until January 1, 1987, and mandates that in the meantime, a study be conducted so that we might better deal with this very difficult issue. I know the many Members in both bodies are concerned about the fairness of our present policies and I would expect that as we continue to benefit from the progress of medical science, we will improve our laws in this regard.

Id. at H9836.

No other House member commented on the statutory provision with respect to pain.

It seems clear from the conference report and the statement of Congressman Pickle, a House manager of the bill, that it was the intent of Congress to write the regulation dealing with pain into the statute. That this result was accomplished is evidenced by the fact that the amended statute closely tracks the regulations.

The question, then, is does the amended statute negate the settlement agreement approved by this Court. We conclude it does not. The Secretary's sup-

plemental brief of August 1, 1984, quoted above, provides the rationale for this conclusion.

Our understanding is simply this: The amended statute on pain evaluation requires the Secretary and adjudicator to follow regulation § 404.1529 and ruling SSR 82-58 in evaluating pain until January 1, 1987. Adjudicators are to do so, however, in light of the settlement agreement which recognized that some adjudicators had misinterpreted SSR 82-58. It follows that all pain cases in the Eighth Circuit currently under evaluation at the administrative or judicial level will be evaluated on the basis of the amended statute, regulation § 404.1529, and ruling SSR 82-58 as clarified by the settlement agreement. Cases filed after this date will be evaluated on the same basis. As we stated in our opinion of July 17, 1984, the settlement agreement is "a correct statement of the law concerning evaluation of pain and other subjective complaints for determining disability." It would thus seem that any differences between the Secretary and this Circuit with respect to the law relating to the evaluation of pain have been resolved and that there is no longer a question of nonacquiescence on the part of the Secretary although questions as to the substantiality of evidence in pain cases will undoubtedly continue to arise in the future.

There remain a number of specific problems with which we now deal.

Some named and unnamed members of the *terminated* class claim that the pain standard has been incorrectly applied in their cases. In such instances, the claim must be remanded to the Secretary, who will review their cases in light of the 1984 Act and this opinion.

Other named plaintiffs raising the pain issue (but not the issue of medical improvement) have cases pending before this Court or district courts within the Circuit. These cases should be decided in accordance with this opinion by the courts having jurisdiction of the cases. Cases may be remanded to the Secretary where substantial evidentiary questions remain.

The class as certified also includes claimants whose disability claims were denied by the Secretary but who at the time of certification were still pursuing administrative appeals, or if not pursuing administrative appeals, were not time barred from doing so. As to these claims, the district court concluded that a waiver of the requirement of exhaustion was appropriate in this case. This is the most difficult issue in this appeal. The Secretary argues that the Court does not have jurisdiction over these cases and so must vacate this portion of the district court's preliminary injunction under the Social Security Act, 42 U.S.C. § 405(g) (1982), and the mandamus statute, 28 U.S.C. § 1361 (1982). We find that the Court does have jurisdiction over these claims and that this carefully defined section of the class is entitled to relief.

Section 405(g) provides that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the dis-

> trict court of the United States for the judicial district in which the plaintiff resides * * *.

This section involves several elements: (1) the individual must have presented a claim for benefits to the Secretary, and (2) the individual must have exhausted the administrative remedies established by the Secretary. The first requirement is "jurisdictional" in the sense that it may not be waived; the second requirement may be waived by either the Secretary or the courts. *Heckler v. Ringer*, 52 U.S.L.W. 4547, 4551 (May 14, 1984); *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976); *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 969 (8th Cir. 1983). Each of the class members has submitted a claim for disability benefits to the Secretary; none, however, exhausted his or her administrative remedies. Thus, the question is whether the district court properly waived the exhaustion requirement for them.

As we noted in *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 969, "[t]he Supreme Court has taken a rather pragmatic approach" to this requirement. In *Mathews v. Eldridge*, 424 U.S. at 330, the Supreme Court acknowledged that, while the waiver determination generally belongs to the Secretary, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." It went on to determine that waiver was proper because the plaintiff's legal claim was entirely collateral to his substantive claim of entitlement, and he had "at least a colorable claim that * * * an erroneous termination would damage him in a way not recompensable through retroactive

payments." *Id.* at 331 (footnote omitted). *See also Heckler v. Ringer*, 52 U.S.L.W. at 4551-52.

The Second Circuit also recently suggested that analysis of whether waiver is appropriate requires a flexible, pragmatic approach:

> Although *Eldridge* and *Ringer* make clear the circumstances that permit a court to waive exhaustion, they do not establish whether each of the individual factors deemed relevant in those decisions—futility, collaterality, and irreparable harm—must be present before a court may dispense with exhaustion. In the absence of express guidance, we have taken the view that no one factor is critical. * * * We have adopted a more general approach, balancing the competing considerations to arrive at a just result under the circumstances presented.

City of New York v. Heckler, No. 84-6037, slip op. 6015, 6027-28 (2d Cir. Aug. 27, 1984) (citation omitted).

We determined in *Mental Health* that waiver of the exhaustion requirement was proper, based upon a pragmatic analysis of the claimants' interest in judicial review at that point in the proceedings and the relative harm to the agency's administrative process. *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 970-71. A similar pragmatic analysis leads us to conclude that waiver is appropriate in this case for several reasons. First, the district court found, and we agree, that the plaintiffs face potentially irreparable harm. In the district court's words,

> It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face

> foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions.

Polaski v. Heckler, 585 F. Supp. 1004, 1013 (D. Minn. 1984).

Secondly, deference to the Secretary's judgment concerning exhaustion is inappropriate in light of the plaintiffs' contention that administrative adjudicators at every level have evaluated complaints of pain using an improper standard. As noted above, the Secretary herself acknowledged that

> some adjudicators may have misinterpreted the Secretary's policies as enunciated in SSR-82-58.
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> In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain.

Polaski v. Heckler, 739 F.2d at 1322.

This Court has reversed the Secretary's denial of disability due to her failure to follow the proper pain standard on a number of occasions. In 1984 alone, we reversed or remanded to the Secretary because of inadequate consideration of pain in at least thirteen cases, while affirming the Secretary's analysis of pain or other subjective complaints in none. *Douglass v. Schweiker*, 734 F.2d 399 (8th Cir. 1984); *Carpenter v. Heckler*, 733 F.2d 591 (8th Cir. 1984); *Reinhart v. Secretary of Health and Human Serv-*

ices, 733 F.2d 571 (8th Cir. 1984); *Ledoux v. Schweiker*, 732 F.2d 1385 (8th Cir. 1984); *Nunn v. Heckler*, 732 F.2d 645 (8th Cir. 1984); *Marshall v. Heckler*, 731 F.2d 555 (8th Cir. 1984); *Brissette v. Heckler*, 730 F.2d 548 (8th Cir. 1984); *Allred v. Heckler*, 729 F.2d 529 (8th Cir. 1984); *Smith v. Schweiker*, 728 F.2d 1158 (8th Cir. 1984); *Layton v. Heckler*, 726 F.2d 440 (8th Cir. 1984); *Basinger v. Heckler*, 725 F.2d 1166 (8th Cir. 1984); *Tome v. Schweiker*, 724 F.2d 711 (8th Cir. 1984); *Warner v. Heckler*, 722 F.2d 428 (8th Cir. 1984). As in *Mental Health*, the high reversal rate "fortifies our decision to waive exhaustion in light of the potentially irreparable harm incurred by the plaintiffs as a result of this procedural irregularity." *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 970.

Third, at the time this appeal was submitted, the Secretary argued strenuously that she was acquiescing in this Circuit's decisions concerning the pain standard, although she acknowledged that the standard may have been misapplied by some administrative adjudicators. In light of the Secretary's position, we deferred our disposition of this appeal in order to permit the Secretary and the plaintiffs to achieve a settlement agreement on the proper pain standard. We took this step also because it allowed the Secretary to pursue the national uniformity of administration which she contends is so important. As a result of the parties' settlement agreement, all class members whose claims have been decided since July 17, 1984, will have their claims re-decided under the proper pain standard. Those class members whose claims were decided before this date have not received this relief. This result is not only unfair, but if permitted, would diminish the Court's author-

ity to direct uniform and equitable relief in class actions.

Fourth, in light of the relief sought by the plaintiffs, deferring to the agency is both unnecessary and inappropriate. At this point in the proceedings no further elaboration of agency policy is likely. The parties' stipulation on pain and the 1984 Act have resolved the controversy over the appropriate standard. All that remains is to give these class members a chance to have their complaints of disabling pain evaluated under the correct standard.

Finally, the plaintiffs' claims are admittedly not "wholly collateral" to their claims for benefits, as was true in *Eldridge*. But the focus of their relief as a class—the Secretary's compliance with our case law and the 1984 Act—is substantially collateral to the issue of whether they are in fact disabled and entitled to benefits. *See City of New York v. Heckler*, slip op. at 6028-29; *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 971.[3]

The district court narrowly tailored the class to meet the sixty-day requirement of section 405(g). Only those class members who received an adverse decision from the Secretary within sixty days prior to the filing of the relevant class actions are entitled to relief here.[4]

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[3] In light of our conclusion that there is jurisdiction under section 405(g), it is unnecessary for us to consider whether the mandamus statute provides an alternate basis for jurisdiction.

[4] The class members are those as described above who received an adverse decision within the following time periods:

1) in Minnesota, North Dakota, South Dakota, Nebraska, and Missouri, those persons who received an ad-

Accordingly, those class members who were denied disability benefits on medical or medical-vocational grounds before July 17, 1984 (the date of our order), alleging that they cannot work due to pain or other subjective complaints, and who, although not time barred, have not yet fully exhausted their administrative appeals are entitled to have their claims reconsidered by the Secretary under the proper pain standard. The Secretary shall, within a reasonable time, issue a written notice to these class members (with a copy to their legal representatives, if any) which:

1) Informs each member of the class of the proper pain standard;

2) Asks each member of the class whether he or she contends he or she is unable to work in whole or in part because of pain as defined in the standard;

3) States that each member of the class has a right, if he or she chooses, to have his or her claim reconsidered under the proper pain standard; and

4) Contains other information concerning the availability of attorneys under the Social Security Act to assist claimants in their efforts to gain benefits.

Upon receiving a written request for reconsideration within time limits established by the Secretary,

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verse decision on or after January 30, 1984, through July 16, 1984;

2) in Arkansas, those persons who received an adverse decision at the ALJ or Appeals Council levels on or after February 20, 1984, through July 16, 1984; and

3) in Iowa, those persons who received an adverse decision on or after November 26, 1983, through July 16, 1984.

See Polaski v. Heckler, 585 F. Supp. 1004, 1006-07 & n.1 (D. Minn. 1984).

the Secretary shall consider the application under the proper pain standard and shall issue a written decision within a reasonable time. No deadlines, and no interim benefits to class members whose claims were not reconsidered by a deadline, are required of the Secretary. The district court shall thus retain jurisdiction over the pain cases in this manner.

IV. CONCLUSION.

This case is remanded to the district court with directions to proceed in a manner consistent with this opinion.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

While I agree with a substantial part of what the court holds today, I am unable to agree that the district court properly waived the requirement of exhaustion of administrative remedies for those class members who alleged disabling pain but did not pursue timely appeals after denial of their claims. The court today considerably exceeds the limits of the waiver doctrine as set down in *Mental Health Association v. Heckler*, 720 F.2d 965 (8th Cir. 1983). Several factors present in *Mental Health* are not present in this case, the most notable being that the claimants in *Mental Health*, because of their conditions, were often incapable of understanding or effectively using their appeal rights. *Id.* at 970. Given the extensive public discussion of the Social Security situation in this circuit from late November 1983 through July 16, 1984, I find it hard to believe that persons truly threatened with such irreparable harm as hypothesized by the court would not have sought administrative review of the denials of their benefits.

In addition, in *Mental Health* there was a finding by the district court that an improper presumption was being applied; thus, we held, additional agency proceedings would not result in further clarification of agency policy and immediate court review would not "interfere prematurely with agency procedures." *Id.* at 970-71. Here, while there have been many misapplications of the pain standard, the July 17, 1984, stipulation concerning the standard in such cases does not demonstrate the existence of an erroneous policy or procedure. *Polaski v. Heckler*, 739 F.2d 1320, 1321-22 (8th Cir. 1984). There is less reason to believe that blanket court intervention is necessary and I would defer to normal agency procedures, including the Secretary's decisions on when waiver of exhaustion is appropriate.

The extension of *Mental Health* to the facts of this case is contrary to the principles laid down in *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (waiver of exhaustion requires the existence of a challenge entirely collateral to the substantive claim of entitlement plus a colorable claim of irreparable harm). Accordingly, I dissent from that portion of the opinion dealing with the waiver of exhaustion, commencing on page 15 of the court's opinion. I would not allow those seeking administrative review to continue in this litigation.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 84-5085

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

Submitted June 12, 1984

Decided July 17, 1984

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

ORDER

On January 20, 1984, Lorraine Polaski filed a complaint in federal district court for the District of Minnesota, seeking review of the termination of her social security disability benefits by the Secretary of Health and Human Services (Secretary). She later successfully amended her complaint to pursue her case as a class action on behalf of similarly situated disabled persons within the Eighth Circuit. The amended complaint alleges: first, that the Secretary is not following Eighth Circuit law by requiring that objective medical evidence fully corroborate a dis-

ability claimant's allegations of pain and other subjective complaints; and second, that the Secretary is not following Eighth Circuit law by terminating disability benefits absent new evidence demonstrating either that the claimant's condition has materially improved or that the original decision granting benefits was erroneous.

On April 27, 1984, the district court issued a preliminary injunction and revised its class certification order, 585 F.Supp. 1004. The court determined that the Secretary was nonacquiescing in Eighth Circuit decisions concerning both the standard for evaluating pain and other subjective complaints and the standard for evaluating medical improvement. The court enjoined the Secretary from denying or terminating disability benefits without following those decisions. It also provided for reconsideration of the claims of persons within the class under the proper standards.

On May 1, 1984, the Secretary sought an emergency stay of the preliminary injunction pending appeal to our Court. The district court denied the motion for a stay on May 2, 1984. The Secretary filed a notice of appeal on May 15, 1984. On May 25, 1984, our Court granted a temporary stay pending appeal. We heard oral argument on June 12, 1984.

In her brief and at oral argument, the Secretary maintained that she had been applying Eighth Circuit cases concerning the standard for evaluating allegations of pain and other subjective complaints. At the conclusion of oral argument, we stated from the bench that our Court would defer any immediate action in order to allow the parties a chance to reach an agreement on the standard to be used in evaluating pain and other subjective complaints in cases within the Eighth Circuit.

On July 11, 1984, the Justice Department notified this Court that the parties reached a settlement, agreeing that the relevant standard is as follows:

> A claimant has the burden of proving that the disability results from a medically determinable physical or mental impairment. Symptoms such as pain, shortness of breath, weakness, or nervousness are the individual's own perceptions of the effects of a physical or mental impairment(s). Because of their subjective characteristics and the absence of any reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove, or quantify. As a result of this difficulty, some adjudicators have misinterpreted the Secretary's policies as enunciated in SSR-82-58.
>
> In particular, some adjudicators may have misinterpreted Example No. 2 in SSR-82-58 to allow allegations of pain to be disregarded solely because the allegations are not fully corroborated by objective medical findings typically associated with pain. The example should not be construed to be inconsistent with the text of SSR-82-58 which states in part:
>
> > The effects of symptoms must be considered in terms of any additional physical or mental restrictions they may impose beyond those clearly demonstrated by the objective physical manifestations of disorders. Symptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective and medical findings alone.
>
> While the claimant has the burden of proving that the disability results from a medically ter-

minable physical or mental impairment, direct medical evidence of the cause and effect relationship between the impairment and the degree of claimant's subjective complaints need not be produced. The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

1. the claimant's daily activities;

2. the duration, frequency and intensity of the pain;

3. precipitating and aggravating factors;

4. dosage, effectiveness and side effects of medication;

5. functional restrictions.

The adjudicator is not free to accept or reject the claimant's subjective complaints *solely* on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole. [Emphasis in original.]

The parties also agreed that the Secretary will transmit the agreed-upon language to adjudicators

within the Eighth Circuit responsibile for determining disability, including personnel in state and district offices, and personnel within the Social Security Administration, ALJs, and the Appeals Council. The language is to be transmitted no later than July 18, 1984.

This Court agrees with the above language as a correct statement of the law concerning the evaluation of pain and other subjective complaints for determining disability. This language thus serves as a correct restatement of our case law, to be followed in all administrative and judicial proceedings within the Eighth Circuit.

This order shall be issued forthwith. All other questions raised in this appeal are reserved for further decision by this Court.

APPENDIX C

UNITED STATES DISTRICT COURT
D. MINNESOTA
FOURTH DIVISION

Civ. No. 4-84-64

LORRAINE POLASKI, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

April 17, 1984

ORDER

MILES W. LORD, Chief Judge.

This matter comes before the court on plaintiff's motions for conditional class certification, leave to file an amended complaint and a temporary restraining order. The central issues at the heart of these motions concern certain standards used by the Secretary of Health and Human Services (Secretary) in evaluating claims for disability insurance benefits under Title II and Title XVI of the Social Security Act.

Plaintiff Lorraine Polaski is a 50-year-old resident of Hennepin County who began receiving disability benefits in 1979. Four years later, in 1983, the Secretary declared that Polaski was no longer disabled and therefore terminated her benefits. Polaski contends that this decision was not supported by substantial evidence because it improperly discounted her allegations of pain and because there was no evidence to show either that her condition had improved or that the original decision finding her disabled was erroneous.

Polaski further contends that hers is not an isolated case of improper decision-making by the Secretary. Instead, Polaski argues that the Secretary is using erroneous standards on pain and medical improvement on a systemwide basis and that the Secretary's policies run contrary—directly and flagrantly —to the law as set out by the Court of Appeals for the Eighth Circuit. Thus, Polaski seeks to expand her action to include other disability claimants who find themselves in a position similar to hers.

AMENDED COMPLAINT

Polaski moves to file an amended complaint, which includes class action allegations and seeks declaratory and injunctive relief on a class-wide basis.

After plaintiff filed this motion for an amended complaint, the Secretary on April 13 declared a nationwide moratorium on the termination of benefits under Title II and Title XVI on medical or medical-vocational grounds. The government now claims that the amended complaint should not be allowed because members of the proposed class are either non-existent or unidentifiable at the present time. Counsel for plaintiff strongly disagree. They contend that the

moratorium declared by the Secretary does not affect plaintiff Polaski and other individuals like her whose benefits have been terminated and who have exhausted their administrative remedies before the Secretary. This much appears clear from this court's interpretation of the Secretary's moratorium. Likewise, as argued by plaintiff's counsel, the moratorium does not affect first-time applicants who have received an adverse determination before the Secretary where they have claimed disability based upon their subjective complaints of pain.

Furthermore, federal courts follow a liberal policy in allowing motions to amend pleadings. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed. 2d 222 (1962); *Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690, 694 (8th Cir.1981). As stated in Rule 15(a), Fed.R.Civ.P., "leave [to amend pleadings] shall be freely given when justice so requires."

For these reasons, the court concludes that the amended complaint, with the addition of named plaintiff Patrick Blaschko, is proper and shall be allowed.

CLASS CERTIFICATION

The class which plaintiff seeks to certify consists of other claimants who allege that they are unable to work because of pain or other subjective complaints and/or that their medical condition has not improved since their initial applications for disability status were approved. More precisely, the class as proposed by plaintiffs is defined as follows:

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska or Iowa,

(a) Who have been or will be notified that their application for Title II and/or Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical/vocational grounds; and

(b) Who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and

(c) Who are pursuing or will pursue timely, administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984,

(d) Provided, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.

This proposed class was defined to include all claimants within the jurisdiction of the Court of Appeals for the Eighth Circuit whose claims regarding the Secretary's standards on pain and medical improvement are not already being dealt wtih in some type of unified action. Thus, the proposed class does not include claimants residing in Arkansas, which has imposed its own moratorium on benefits terminations and which has been following the law

of the Eighth Circuit regarding pain and medical improvement for some time. Likewise, the class would not include claimants alleging disability due to pain in Missouri, where a class already has been certified on this issue. (The Missouri class is the only one brought to this court's attention which would be covered by paragraph (d) of the present class certification).

The class includes only those claimants whose cases have been decided on medical or medical-vocational grounds. The class does not include persons who have had their disability claims decided on other grounds, such as refusal to cooperate, excess assets, or engaging in substantial gainful activity.

This court finds that the proposed class meets all of the requirements for certification as set out in Rule 23(a) and (b)(2), Fed.R.Civ.P.

The class as defined is so numerous that "joinder of all members is impracticable." Rule 23(a)(1), Fed.R.Civ.P. Using projections and extrapolations from government data, plaintiffs estimate that the class includes 4,200 claimants whose benefits were terminated without the use of a medical improvement standard and 2,430 claimants whose allegations of pain or other subjective symptoms were improperly evaluated. This amounts to a class size of 6,630, clearly satisfying the numerousity requirements of Rule 23.

This case involves common questions of law and fact concerning the Secretary's policies as to the evaluation of pain or other subjective complaints and medical improvement. These policies appear to have been promulgated at the highest level of the Social Security Administration and appear to have been applied uniformly to the class as a whole. The claims of the

representative parties are typical of those of the class, and final injunctive or declaratory relief may well be appropriate. Thus, the requirements of Rule 23(a)(2), 23(a)(3) and 23(b)(2) are met.

This court is also satisfied that the representative parties "will fairly and adequately protect the interests of the class." Rule 23(a)(4), Fed.R.Civ.P. Plaintiffs' counsel are legal services attorneys with extensive experience in the areas addressed by this action and will vigorously puruse the litigation.

Finally, this court has jurisdiction over all members of this proposed class by virtue of both section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), and the mandamus statute, 28 U.S.C. § 1361. *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965 (8th Cir.1983).

TEMPORARY RESTRAINING ORDER

Plaintiffs seek a temporary restraining order to enjoin the Secretary from applying the improper pain and medical improvement standards and to require the Secretary to freeze certain case files in their current locations. This order would halt the denial and termination of benefits, thereby preserving the status quo until this court can make a ruling on the proper standards and the appropriateness of further relief.

This court finds that such an order is warranted at this time, the plaintiffs having demonstrated with ample sufficiency that they have an excellent chance of succeeding on the merits of their action, that they will suffer irreparable harm if a restraining order is not entered forthwith, that the impact of this order on the Secretary is far outweighed by the interests of the plaintiffs in obtaining immediate relief and that the order is in the public interest. *See Data-*

phase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir.1981).

Plaintiffs claim in essence that the Secretary has placed herself above the law by refusing to comply with the edicts of the Court of Appeals for the Eighth Circuit.

On the issue of pain, plaintiffs cite to some 19 cases which hold that the Secretary must give serious consideration to a claimant's subjective complaints of pain, even where such complaints are not fully corroborated by objective medical evidence.[1] Despite these rulings, the Secretary appears to continue to require the individuals claimant to prove a direct cause and

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[1] The cases cited by the plaintiffs are:

Yawitz v. Weinberger, 498 F.2d 956 (8th Cir. 1974); *Lund v. Weinberger*, 520 F.2d 782 (8th Cir. 1975); *Brand v. Secy. of Dept. of Health, Etc.*, 623 F.2d 523 (8th Cir. 1980); *Ragsdale v. Secy. of Dept. of Health*, 623 F.2d 528 (8th Cir. 1980); *Cole v. Harris*, 641 F.2d 613 (8th Cir. 1981); *Tucker v. Schweiker*, 689 F.2d 777 (8th Cir. 1982); *Thorne v. Schweiker*, 694 F.2d 170 (8th Cir. 1983); *McDonald v. Schweiker*, 698 F.2d 361 (8th Cir. 1983); *Simonson v. Schweiker*, 699 F.2d 426 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334 (8th Cir. 1983); *Bastian v. Schweiker*, 712 F.2d 1278 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833 (8th Cir. 1983); *Baugus v. Scy. of HHS*, 717 F.2d 443 (8th Cir. 1983); *Streissel v. Schweiker*, 717 F.2d 1231 (8th Cir. 1983); *Mallet v. Schweiker*, 721 F.2d 256 (8th Cir. 1983); *Warner v. Heckler*, 722 F.2d 428 (8th Cir. 1983); *Tome v. Schweiker*, 724 F.2d 711 (8th Cir. 1983); *Nelson v. Heckler*, 712 F.2d 346 (8th Cir. 1983); *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983).

This list does not include the numerous decisions of district courts which also direct the Secretary to employ the proper standard regarding complaints of pain. *See, e.g., Roberts v. Schweiker*, 583 F.Supp. 724 (D.Minn.1984); *Fenus v. Schweiker*, 584 F.Supp. 45 (D.Minn.1983).

effect relationship between the objective medical evidence and the amount of pain suffered.

Such is the burden placed upon plaintiff Polaski, whose claim for disability benefits rests upon her allegations of severe and continuous pain. After receiving notice of her termination from benefits, Polaski requested and received a hearing before an administrative law judge (ALJ). In evaluating Polaski's claims of pain, the ALJ first gave lip service to the Eighth Circuit's rulings and then concluded that "none of the medical reports contain any significant findings to substantiate constant, severe, intractable pain." (Transcript of administrative proceedings, p. 28).

The Court of Appeals recently took note of the Secretary's policy of disregarding the law of this circuit:

> For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain. The Secretary must give consideration to subjective complaints of pain and may not disregard them solely because they are not fully corroborated by the objective medical evidence.

Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983).

The Eighth Circuit again had occasion to criticize the Secretary for failing to abide by the proper standard in the case of *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983). The court, in quoting from the lower court opinion, stated:

> The result of this individual case should not obscure the fact that the regulations of HHS are not the supreme law of the land. 'It is emphatically the province and duty of the judicial de-

> partment, to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1904); and the Secretary will ignore that principle at his peril.

715 F.2d at 430. Judge McMillian in the same case commented separately:

> While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite confrontation with the Secretary. Yet, if the Secretary persists in pursuing here nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities.

Id. at 430.

In a recent law review article, Judge Heaney of the Eighth Circuit recognized the Secretary's policy of nonacquiescence:

> The SSA apparently has directed that decisions of both the district courts and the courts of appeals should be ignored in deciding whether to grant or deny benefits to individual claimants. A memo to all ALJs dated January 7, 1982, from the Associate Commissioner of the Office of Hearings and Appeals, is typical of the Secretary's approach. The memo emphasized that the Deputy Assistant General Counsel 'stressed the point that the federal courts do not run SSA's programs, and that the ALJs are responsible for applying the Secretary's policies and guidelines *regardless of court decisions below the level of the Supreme Court.*'

Heaney, *Why the High Rate of Reversals in Social Security Disability Case?*, 7 Hamline Law Review 1, 9 (1984).

Plaintiffs also claim that the Secretary has failed to follow the proper standard in termination cases. Historically, the Secretary in such cases had employed a medical improvement standard, under which the claimant's current conditions was compared with the condition supporting the original finding of disability, and benefits were terminated only if claimant's condition showed the requisite improvement. *See Graham v. Heckler*, 573 F.Supp. 1573, 1575 n. 1 (W.Va. 1983). Sometime in 1980, the Secretary abandoned this policy, and adopted a "current disability" standard for termination of disability benefits. Once this new policy reached the courts by way of appeal, it was overwhelmingly rejected as improper. *See, e.g., Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984); *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983); *Kuzmin v. Schweiker*, 714 F.2d 1233 (3rd Cir. 1983); *Simpson v. Schweiker*, 691 F.2d 966 (11th Cir. 1982); *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Hyatt v. Heckler*, 579 F.Supp. 985 (N.C. 1984); *Doe v. Heckler*, 576 F.Supp. 463 (Md. 1983); *Graham v. Heckler*, 573 F.Supp. 1573 (W.Va. 1983); *Musgrove v. Schweiker*, 552 F.Supp. 104 (Pa. 1982); *Shaw v. Schweiker*, 536 F.Supp. 70 (Pa. 1982). These courts have all held that the Secretary must follow the medical improvement standard, and that the burden of showing the necessary improvement rests with the Secretary.

Plaintiffs argue that the Secretary has violated both the Social Security Act and the Constitution by failing to follow the proper standards regarding pain

and termination. The cases cited by plaintiffs strongly support a finding that the Secretary is not adhering to its constitutional duty to provide due process to individual claimants. By not following the law of this circuit, the Secretary adopts a course of action in disregard of the fundamental fairness due each claimant. The Secretary further appears to be in violation of the constitutional doctrine of separation of powers. As was first made clear in the Supreme Court case of *Marbury v. Madison, supra,* it is the duty of government agencies to follow the law as interpreted by the courts. Apparently, the Secretary has chosen not to do so. While this court is now considering these matters only preliminarily, it is convinced that there is a strong likelihood that plaintiffs will prevail on the merits of their claims. A further and more detailed discussion of these issues will be required upon a full hearing on plaintiffs' motion for a preliminary injunction.

As for irreparable harm, the class of plaintiffs consists of disabled persons for whom Social Security benefits may be their sole source of support. Substantial and irreparable harm is likely to befall these people if their benefits are denied or terminated.

Affidavits submitted by plaintiffs demonstrate the urgency of their plight. Plaintiff Polaski, who states that her disability is worsening, is not able to buy the basic necessities of life without her disability benefits. Carrie F. Turner, a Missouri woman with a heart condition whose benefits were cut off in 1982, states in her affidavit that she has been forced to borrow money from her mother and daughter, whose income derive, in turn, solely from Social Security and AFDC payments. Turner does not have enough money to pay her bills for utilities, food, medications.

She begs for assistance at churches and social agencies.

The hardships of the class were summed up in affidavits filed by James Marshall Smith, an attorney with Legal Aid of Western Missouri, and Doretta Henderson, chairperson of the Kansas City Chapter of the National Welfare Rights Organization, as follows:

> During the appeal period in federal court, which can frequently take in excess of one year, our clients are without benefits. They have many other legal problems as a result, such as eviction suits, collection suits from creditors, problems with utility shut offs, etc. Within the last eighteen months I can remember offhand five of our clients who have died during the appeal process. (Affidavit of Smith)
>
> After being terminated from benefits, many individuals are unable to pay for medical care and obtain the necessary prescriptions for their illness. We also find that individuals often are unable to pay their rent or housing costs, with some individuals losing their homes because of their inability to meet the payments. (Affidavit of Henderson)

In sum, this court finds that plaintiffs have satisfied all of the requirements for a temporary restraining order. Plaintiff Polaski has properly presented her claims before this court and has exhausted her administrative remedies. Only before this court can she—and the class members whom she represents—pursue full and adequate relief.

Accordingly, IT IS HEREBY ORDERED That defendant, her employees, agents and assigns shall:

1. Be enjoined from denying or terminating Title II benefits and from denying Title XVI benefits at any level of administrative review, and from terminating Title XVI benefits at the Administrative Law Judge or Appeals Council levels until a further order of this court concerning the proper standards to be used for the evaluation of pain and other subjective complaints and the proper medical improvement standard.

2. Assure that all Social Security Administration District Offices within the Eighth Circuit retain all Title II and/or Title XVI files in which an adverse initial or reconsideration determination has been or will be made dated on or after January 30, 1984 unless or until the claimant files a timely appeal;

3. Assure that the Appeals Council of the Social Security Administration retains all files in which an adverse decision has been or will be rendered by an Administrative Law Judge or by the Appeals Council dated on or after January 30, 1984 unless or until it is appealed;

4. Issue a teletype to all Social Security Administrative District Offices within the Eighth Circuit and to the Appeals Council containing the instructions set forth in the foregoing paragraphs 1, 2 and 3 within 24 hours of the issuance of this order. The defendant shall send copies of the teletype to plaintiffs' attorneys and to this court.

This temporary restraining order shall stand until the court issues a further order regarding a preliminary injunction, a hearing for which has been set for 2 p.m. April 26.

IT IS FURTHER ORDERED That plaintiffs' motion for leave to file an amended complaint is granted.

IT IS FURTHER ORDERED That plaintiffs' motion for class certification, as defined by this order, is granted.

IT IS FURTHER ORDERED That the government's motions to stay proceedings and to strike portions of plaintiffs' complaint are denied.

IT IS FURTHER ORDERED That by 5 p.m. April 24, 1984, the parties shall provide to this court briefs detailing their respective positions concerning possible future relief for this class, particularly on the issue of the immediate reinstatement of benefits for those individuals whose benefits have been terminated and the immediate payment of benefits to class members whose initial applications have been denied.

IT IS FURTHER ORDERED That by 5 p.m. April 24, 1984, the Secretary shall provide to this court an estimate of the number of persons covered by the class as defined by this order.

APPENDIX D

UNITED STATES COURT OF APPEALS
D. MINNESOTA
FOURTH DIVISION

Civ. 4-84-64

LORRAINE POLASKI, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

April 27, 1984

ORDER

MILES W. LORD, Chief Judge.

INTRODUCTION

Plaintiffs in this class-action suit against the Secretary of Health and Human Services (Secretary) seek a preliminary injunction which would, in essence, compel the government to use the proper standards in evaluating claims for disability insurance benefits under Titles II and XVI of the Social Security Act. After a hearing on April 17, 1984, this court certified a class and issued a temporary re-

straining order to freeze the situation pending further review. A second hearing was held on April 26, 1984, to consider whether a preliminary injunction should issue and, if so, what preliminary relief would be appropriate. The present order is based upon the evidence presented at those hearings and the extensive briefs submitted by the parties.

For several years now, the courts of this circuit have found themselves embroiled in an increasingly frustrating effort to persuade the Secretary to follow their decisions regarding certain legal standards under the disability insurance program. The Secretary, in an apparent effort to reduce the number of disability beneficiaries, has taken a more restrictive approach in recent years in determining eligibility. Often, the Secretary has stuck to this restrictive path even when it has led to direct contravention of federal court edicts. By proceeding in such a manner, the Secretary also has disregarded the fundamental policies at the heart of the disability program:

> Congress enacted the social security disability insurance program in order to provide benefits to individuals who become disabled and can no longer "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The program is intended to aid workers who, after having contributed to the nation's workforce, are unable to continue to do so because of a disability. The underlying purpose of this program is to ease the economic dislocations and hardships that often accompany disability. The Act is a remedial one which should be broadly construed and liberally applied to effectuate its humanitarian goals.

Judge Gerald W. Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 Hamline Law Review 1, 2 (1984) (footnotes omitted).

In the present action, plaintiffs challenge two specific policies of the Secretary: (1) the agency policy of requiring objective medical evidence to *fully corroborate all* allegations of pain and other subjective complaints, and (2) the agency policy of terminating disability benefits without *new evidence* showing that the claimant's medical condition has improved or that the prior decision was erroneous. Plaintiffs contend that these policies violate the Social Security Act as well as the separation of powers doctrine and due process rights under the U.S. Constitution.

JURISDICTION

At the threshold, the Secretary argues that this court lacks the jurisdiction to consider this action. The Secretary's extended arguments along this line, however, ignore principles that have by now become well-established in actions of this nature. *See, e.g., Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 968-71 (8th Cir. 1983). This court therefore concludes that it has jurisdiction over all members of this class by virtue of both section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), and the mandamus statute, 28 U.S.C. § 1361.

Jurisdiction under section 205(g) imposes two requirements. The first mandates that the individual present a claim to the Secretary, which all members of this class clearly have done. The second requires that the individual exhaust his administrative remedies and receive a final decision from the Secretary before seeking relief in the courts. It is true that some members of this class have not yet proceeded

through all levels of agency appeals. This second requirement is, however, waivable by either the Secretary or the courts when necessary to prevent irreparable harm or the loss of crucial collateral claims. *Mathews v. Diaz*, 426 U.S. 67, 75-77, 96 S.Ct. 1883, 1889-1890, 48 L.Ed.2d 478 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 900 n. 11, 47 L.Ed.2d 18 (1976).

This court finds that such a waiver is appropriate in the present case. As set out in detail below, this class of plaintiffs will suffer irreparable harm if its claims are not acted upon immediately. This class does not have the resources to endure delay upon delay; the members of this class depend upon disability benefits to meet the most basic of their needs, to sustain their health and well-being. Further, it would be futile and inefficient to force these plaintiffs to pursue their claims through level after level of agency review when it appears that the agency is systematically relying upon improper standards. *Mental Health Association of Minnesota*, 720 F.2d at 970-71.

As for mandamus jurisdiction, it is well established that courts will assert such jurisdiction when no other adequate remedy is available and the plaintiff is owed a clear duty. *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 543-44, 57 S.Ct. 855, 857, 81 L.Ed. 272 (1937). Such is the situation in the present action, in which a writ of mandamus would not supplant the Secretary's duty delegated authority to make the factual determinations upon which eligibility depends but would merely compel the Secretary to make such determinations in a lawful manner. *Mental Health Association of Minnesota*, 720 F.2d at 971-72 n. 17.

REVISED CLASS CERTIFICATION

Plaintiffs move for a revised class certification, apparently on the basis of newly-acquired information on the status of various class actions which have been filed but not yet certified throughout the Eighth Circuit's jurisdiction. The class as originally certified in this court's order of April 17 was defined to include disability claimants within the Eighth Circuit who have viable claims regarding the Secretary's standards on pain and medical improvement but whose claims are not already being dealt with in some other collective action.

Thus, the original certification excluded residents of Arkansas because that state had had some success on its own in convincing the agency to follow the law of the Eighth Circuit and had imposed its own moratorium on terminations under improper standards. This court is now advised, however, that the Secretary's acquiescence and the state's moratorium came as recently as December 1983. The proper standards therefore have never been applied to some applicants whose claims are still viable. Certainly, these individuals should be included in the class.

The original certification also was too narrow in that it failed to encompass individuals in Arkansas and Iowa for whom the statute of limitations had been tolled by the filing of class actions in their respective states.[1] *American Pipe and Construction Co. v. State of Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). This court finds that the class appropriately encompasses these individuals.

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[1] These putative class actions are: *Wilson v. Heckler*, LR-C-83-338 (D. Ark. 1984); *Myers v. Ross, et al.*, Civ. No. 82-170-B (D. Iowa 1982), and *Bradley v. Hecker*, No. 2c-84-3010 (D. Iowa 1984). Class certification is still pending in each of these suits.

Accordingly, this court orders that the class be redefined as follows:

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska, Iowa, or Arkansas,
>
> a) who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical vocational grounds; and
>
> b) who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and
>
> c) who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984, provided however that,
>
> > (1) as to those who are residents of Arkansas and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class includes only (a) those who are pursuing or will pursue timely judicial appeals and (b) those who are pursuing timely administrative appeals at the Administrative Law Judge or Appeals Council level, and (c) those who received or will receive an adverse decision at the Administrative Law Judge or Appeals Council level on or after February 20, 1984;

(2) as to those who are residents of Arkansas and who have been terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after February 12, 1983; and

(3) as to those who are residents of Iowa and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class also includes those who have received an adverse decision at any level of the administrative review process on or after November 26, 1983; and

(4) as to those who are residents of Iowa and who have been or will be terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after January 13, 1982,

d) provided, further, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.

PRELIMINARY INJUNCTION

The Eighth Circuit has set out a four-part test to govern the issuance of preliminary injunctions. In short, this test involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). In applying these factors, courts are advised to use a flexible and equitable approach:

> . . . [T]he question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case.

Id. at 113.

This court turns first to a consideration of the probability of plaintiffs succeeding on the merits of their action.

The Pain Standard

Plaintiffs argue that the Secretary is systematically applying an erroneous standard in evaluating complaints of pain. Numerous decisions of the Eighth Circuit, cited by plaintiffs, hold that subjective complaints of pain must be given serious consideration, even when not fully corroborted by objective medical evidence. *See, e.g., Brand v. Secy of Dept. of Health, Etc.*, 623 F.2d 523 (8th Cir. 1980); *Cole v. Harris*,

641 F.2d 613 (9th Cir. 1981); *Tucker v. Schweiker*, 689 F.2d 777 (8th Cir. 1982); *Simonson v. Schweiker*, 699 F.2d 426 (8th Cir. 1983); *Nelson v. Heckler*, 712 F.2d 346 (8th Cir. 1983); *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983).[2] Under these decisions, all that is required is that there be medical evidence of a mental or physical impairment. Once that is established, the claimant need not show a direct cause and effect relationship between his condition and the level of pain that he suffers:

> Of course, under the Act, there must be medical evidence of physical or mental impairment. Disregard of a claimant's subjective complaints of pain, however, is not justified solely because there exists no objective evidence in support of such complaint.

Northcutt v. Califano, 581 F.2d 164, 166 (8th Cir. 1978) (footnote omitted); *Brand v. Secy. of Dept. of Health, Etc.*, 623 F.2d at 526.

To require that the medical evidence fully supports the individual's complaints of pain ignores the reality that each person is different in the way that he deals with his particular impairment:

> These claimants are real people and entitled to have their disabilities measured in terms of their total physiological well-being. Different people

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[2] This list is by no means exhaustive. In total, plaintiffs refer this court to nineteen Eighth Circuit opinions with similar holdings on the issue of pain. In addition, this list does not include the numerous decisions of the district courts which also direct the Secretary to give serious consideration to complaints of pain whether or not such complaints are fully corroborated by the medical evidence. *See, e.g., Roberts v. Schweiker*, 583 F.Supp. 724 (D. Minn. 1984); *Fenus v. Schweiker*, 584 F.Supp. 45 (D. Minn. 1983).

> react in markedly different ways to similar injuries. A back condition may affect one individual in an inconsequential way, whereas the same condition may severely disable another person who has greater sensitivity to pain or whose physical condition, due to age, obesity, deformity, or general physical well-being is generally deteriorated.

Landess v. Weinberger, 490 F.2d 1187, 1190 (8th Cir. 1974).

The Secretary argues that the pain standard enunciated by the Court of Appeals is indeed being followed. She contends that there is no systemwide policy ignoring the law of this circuit, but rather only erroneous results in certain isolated cases.

The evidence against the Secretary's argument is overwhelming. The court first turns to the very decisions of the Eighth Circuit defining the proper standard, which the Secretary argues are "isolated cases":

> For some unexplained reasons, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain. The Secretary must give consideration to subjective complaints of pain and not disregard them solely because they are not fully corroborated by the objective medical evidence.

Nelson v. Heckler, 712 F.2d at 348.

The Eighth Circuit again confronted the continuing problem of the Secretary applying an improper pain standard in the case of *Hillhouse v. Harris, supra.* In quoting from the lower court opinion, the Eighth Circuit warned the Secretary that it considered her refusal to apply the proper pain standard as a violation of law:

> The result of this individual case should not obscure the fact that the regulations of HHS are not the supreme law of the land. 'It is emphatically the province and duty of the judicial department, to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 117, 2 L.Ed. 60 (1804); and the Secretary will ignore that principle at his peril.

715 F.2d at 430.

Commenting separately in *Hillhouse*, Judge McMillian further warned the Secretary of the consequences of her policy of nonacquiescence:

> While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite confrontation with the Secretary. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities.

Id. at 430.

The Secretary contends that her regulations strictly comply with the Eighth Circuit's rulings on pain. Specifically, the Secretary points to the following:

> *How we evaluate symptoms, including pain.* If you have a physical or mental impairment, you may have symptoms (like pain, shortness of breath, weakness or nervousness). We consider all your symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The effects of all your symptoms, including severe and prolonged pain, must be evaluated on the basis of a medically determinable impairment which can be shown to

> be the cause of the symptom. We will never find that you are disabled based on your symptoms, including pain, *unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms.*

20 C.F.R. § 404.1529 (emphasis added).

This regulation, contrary to the Secretary's contention, does not meet the standard declared by the Eighth Circuit for evaluating complaints of pain. The Secretary's regulation clearly requires that the individual claimant show sufficient objective proof of his subjective complaints in order to receive benefits. The cases of this circuit emphatically direct the Secretary to carefully evaluate an individual's complaints of pain, *regardless of whether or not those subjective complaints are supported by medical evidence.* Rather than adopt this standard, the Secretary has declared that symptoms of pain themselves must be objectively verified by medical evidence. In her regulation, the Secretary requires the individual claimant to draw a direct connection between his condition and the pain he suffers by showing that he is impaired by a "medical condition that could be *reasonably expected to produce those symptoms.*"

Eighth Circuit Law interpreting the Social Security Act explicitly states that such a connection need not be established. Whether or not the claimant's impairment should or should not produce disabling pain is simply not dispositive of the issue surrounding whether the claimant actually suffers from disabling pain. By requiring even a "reasonable" connection between the impairment and the claimant's symptoms of pain, the Secretary introduces into the evaluation an erroneous objective medical standard not required

under the law. Individual applicants must be taken as they are, complete with what may be their peculiar sensitivities to the pain which afflicts them.

Even if this court were to ignore a common sense reading of the Secretary's regulation, it would have to conclude that the Secretary is in fact applying her regulation in a manner contrary to Eighth Circuit law. Under Social Security Ruling 82-58,[3] the Secretary has made it even clearer that subjective complaints of pain will not be seriously considered unless established by objective medical evidence:

> Once . . . a medical condition (e.g. disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss, and atrophy. *There must be an objective basis to support the overall evaluation of impairment severity.* (emphasis added).

Furthermore, in recent decisions the Secretary's Appeals Council has directly refused to follow the proper pain standard, even when specifically ordered to do so by a federal district court. In *Nickels v.*

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[3] Social Security Rulings are essentially policy statements issued by the Commissioner of Social Security.

Schweiker, No. 82-0265-CV-W-8 Slip op. (W.D. Mo. June 11, 1983), the district court found that the Secretary had failed to give sufficient consideration to plaintiff's subjective complaints of pain. The court then remanded the matter for further agency action, explicitly instructing the Secretary that she could not ignore subjective complaints of pain, "even if not supported by objective evidence." *Id.* at 13. When the matter reached the Appeals Council,[4] the Council decided to remand the case to an ALJ for further proceedings. On remand, the Council instructed the ALJ to follow "the procedures described in the Court's order of remand." However, the Appeals Council continued:

> [T]he administrative law judge is reminded that Social Security Administration Regulations 404.1529 and 426.929 and Ruling 82-58 direct that pain is a symptom, not an impairment. . . . A finding of disabled, therefore, must not be based on symptoms unless medical signs or findings show that there is a severe medical condition which could be reasonably expected to produce the symptoms and the degree of symptomatology alleged.

Likewise, the order of the district court was not followed in *Devore v. Heckler*, No. C 83-2040 (N.D. Ia. November 22, 1983). There, the district court ruled that an "ALJ may disbelieve a claimant's complaints of pain because of inherent inconsistencies or other circumstances, but not solely because they can-

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[4] The first step in the remand process from district court is to the Appeals Council. The Council may at that point either act upon the matter itself, or refer the case to an ALJ for further findings.

not show the exact physiological source of the pain." *Id.* at 3. The court then remanded the matter for further proceedings before the Secretary. The Appeals Council again remanded to an ALJ for further hearing, noting that the ALJ should follow the directions of the district court. The Appeals Council again, however, cited the ALJ to the Secretary's own erroneous regulations and rulings regarding pain, concluding that a disability "must not be based on symptoms unless medical signs or findings show that there is a severe medical condition which could be reasonably expected to produce the symptoms *and the degree of symptomology alleged.*"

Judge Heaney of the Eighth Circuit recently wrote of the Secretary's policy of disregarding the law of the courts:

> The SSA apparently has directed that decisions of both the district court and the courts of appeals should be ignored in deciding whether to grant or deny benefits to individual claimants. A memo to all ALJs dated January 7, 1982, from the Associate Commissioner of the Office of Hearings and Appeals, is typical of the Secretary's approach. The memo emphasized that the Deputy Assistant General Counsel "stressed the point that the federal courts do not run SSA's programs, and that the ALJs are responsible for applying the Secretary's policies and guidelines *regardless of court decisions below the level of the Supreme Court.*"

Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 Hamline Law Review 1, 9 (1984).

Thus, the Secretary apparently has decided to obey only the edicts of the U.S. Supreme Court. At the

same time, however, the Secretary refuses to appeal adverse rulings to the Supreme Court, thus depriving the Court of the opportunity to issue opinions on disputed issues and eliminating the Secretary's risk of being bound by a decision of the highest court in the land. Instead, the Secretary merely follows the ruling as to the individual claimant whose case was before a lower court, while ignoring general precedents set out by such courts. The Secretary therefore faces reversal on a case-by-case basis, but sees nothing to prevent her from ruling as she chooses in subsequent cases.

In her motion papers before this court, the Secretary even admits to her general policy of ignoring federal court decisions, while arguing simultaneously that she is following the law of this circuit:

> [C]onsiderations of inter-branch comity suggest that the Secretary should decline to follow court of appeals opinions only after *due and respectful consideration of such opinions.*

Defendant's Memorandum in Opposition to Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction, p. 14 n. 10.

Whether it be out of due and respectful consideration or bad faith, the Secretary has nonetheless breached her duties under the Social Security Act and the U.S. Constitution by not following the law of this circuit. By implementing her policy of nonacquiesence, whether it be by formal ruling or otherwise,[5]

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[5] The Secretary argues that she has not adopted a policy of nonacquiesence in this case because she has not issued a formal ruling nonacquescing in the orders of this circuit. The Secretary did in fact issue such a ruling regarding the Ninth Circuit's decision that the Secretary must follow the medical improvement standard in termination cases. *See Lopez v.*

the Secretary impairs the right of each individual to a proper consideration of his subjective complaint, including pain.

For these reasons, this court preliminarily concludes that the Secretary has applied an erroneous pain stanadrd on a system-wide basis, violating the Social Security Act, the due process clause of the Fifth Amendment and the constitutional doctrine of the separation of powers. Plaintiffs have more than sustained their burden of showing a likelihood of success on the merits on this issue.

The Medical Improvement Standard

Plaintiffs further argue that the Secretary has applied an erroneous standard when terminating benefits for individuals who had once been declared by the Secretary to be disabled. Plaintiffs claim that the Secretary is required under the Social Security Act to employ a "medical improvement standard", which would require the Secretary to show that an individual's medical condition has materially improved, or that there was a clear error in the initial decision, before terminating benefits. The Secreatry presently adheres to a "current disability" standard, which allows the Secretary to merely look at the present evidence of disability and make a new determination of whether or not an individual's disability has ceased.[6]

Heckler, 725 F.2d 1489 (9th Cir. 1984). This court finds such a distinction to be meaningless. Whether or not a formal ruling has been issued is irrelevant; the Secretary's policy of ignoring federal court decisions remains alive.

[6] The Secretary argues that at least in some cases "new" medical evidence is gathered in determining whether an individual's disability has ceased. Even if this is true in some cases, the Secretary still refuses to follow the medical improvement standard urged by plaintiffs to be the proper one.

The Secretary's "current disability" standard has been overwhelmingly rejected by the courts. *See, e.g., Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Dotson v. Schweiker*, 719 F.2d 80 (4th Cir. 1983); *Kuzmin v. Schweiker*, 714 F.2d 1233 (3rd Cir. 1983); *Simpson v. Schweiker*, 691 F.2d 966 (11th Cir. 1982); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Graham v. Heckler*, 573 F.Supp. 1573 (W.Va. 1983); *Hyatt v. Heckler*, 579 F.Supp. 985 (N.C. 1984); *Doe v. Heckler*, 576 F.Supp. 463 (Md. 1983).

There is no doubt that under the Social Security Act, the claimant "bears a continuing burden of showing . . . that he has a physical or mental impairment," and that "[i]n order to remain eligible for benefits [he] must demonstrate that he is [disabled]." *Mathews v. Eldridge*, 424 U.S. 319, 336 and 343, 96 S.Ct. 893, 903 and 907, 47 L.Ed.2d 18 (1976). This rule does not prohibit, however, a presumption that an individual once disabled remains disabled absent proof that his condition has changed. *See Patti v. Schweiker, supra.* In *Patti*, the Ninth Circuit explained the reasoning for such a presumption in these cases:

> [A] prior ruling of disability can give rise to a presumption that the disability still exists. "Once evidence has been presented which supports a finding that a given condition exists, it is presumed in the absence of proof to the contrary that the condition has remained unchanged." *Rivas v. Weinberger*, 475 F.2d 255, 258 (5th Cir.1973). A presumption . . . impose[s] "on the party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption." Fed.R.Evid. 301.

> The Secretary's own regulations provide that the decision of an ALJ on a disability question becomes binding "on all parties to the hearing" if none of the specific avenues of review are exercised by the claimant or the Secretary. 20 C.F.R. § 416.1455 (1981).
>
> 669 F.2d at 586.

The Secretary's own regulations require that a final decision on the issue of disabilty is binding on both parties. The resulting presumption of continuing disability only requires the Secretary to come forward with evidence that the individual's condition has improved, and does not shift the ultimate burden of proof to the Secretary.

The difference between the medical improvement and current disabilities standards is of great importance to individual claimants. In *Lopez v. Heckler*, *supra*, the Ninth Circuit directed the Secretary to apply the medical improvement standard on a class-wide basis. Subsequently, the agency began a review of the cases of those individuals whose benefits had been terminated under the Secretary's improper current disability standard. Of these individuals, 73% were found to be disabled under this new and proper standard. In addition, the termination rate in Oregon, covered by the *Lopez* decision, has been reduced to only 12.3% compared to the national average of 45.2%. Affidavit of Elena H. Ackel, attorney in the *Lopez* case.

The Secretary argues that the medical improvement standard is too broad, and will allow individuals to remain on the rolls whose situation has improved due to new medical technology or drug treatment, but whose actual medical condition has remained unchanged. Clearly, the effect that such technology or treatment might have on the individual

could be taken into account in considering whether a person's medical condition has materially improved. New technology or treatment may in many cases alleviate the individual's impairment to the point that it is no longer disabling.

The Secretary's afguments along these lines confirm plaintiffs' position that the current standard in termination cases is not designed to merely take those individuals off the rolls who can now work. Rather, it has become clear that the Secretary's intentions have been to simply cut down the number of people receiving benefits.[7] This policy has been carried out at the expense of many people who have been previously found to be disabled and depend upon benefits for their daily needs. While the Secretary has been directed by Congress to carry out a disability review program, it has been carried out in a manner clearly contrary to law.

For these reasons, this court finds plaintiffs have shown substantial likelihood of success on the merits of their claims on this issue.

Irreparable Harm

The irreparable harm likely to befall plaintiffs if this preliminary injunction is not granted is immense. It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face foreclosure proceedings on this homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their

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[7] This court takes note that the ALJs themselves have filed suit in federal court to stop the Secretary from applying pressure to trim the disability rolls. *Association of Administrative Law Judges Inc. v. Schweiker,* Civil No. 83-01244 (D.D.C. filed Jan. 19, 1983).

medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravates their medical conditions. They begin to think of suicide. They even die from the very disabilities the agency denies they have.

The following excerpts from plaintiffs' affidavits detail their compelling plight:

> Because I was not able to meet my utility costs in the winter of 82/83 my natural gas was shut off in May of 1983. Gas not only heats my house but also is the fuel needed for my cooking stove. I live in an older home with poor insulation and the house was quite chilly after the heat was turned off which aggravated the pain in my bones. I had only an electric hot plate to use for cooking . . . Many months I have had no money to pay for doctor's visits, prescription drugs or even over-the-counter pain relievers . . . Especially in the last year I have felt a great sense of isolation and frustration and have experienced moments of despair and wonderment at the futility of going on.

Affidavit of Harriet A. Miller, 61, Mora, Minn., suffering from spinal osteoporosis and arthritis.

> I cannot work because I suffer constant and severe pain, as a result of my degenerative disc disease . . . Our family has no medical coverage at this time . . . If a disc in my back were to slip out again—as had happened on six occasions while I was on disability benefits and Medicare —I would be fully responsible for the hospital bill, which would inevitably amount to several thousand dollars . . . These financial difficulties, the prospect of seeing my life savings dwindle

> away, the constant severe pain, have caused me and my family considerable anxiety and distress. I have suffered, and continue to suffer from a prolonged depression as diagnosed by my psychiatrist. The loss of my income has created problems between me and my wife and has damaged our married life.

Affidavit of Donald Eugene Foster, 59, Maplewood, Minn., truck driver for 36 years.

> I cannot work because of severe and constant pain in my back, due to arthritis and degenerative disc disease . . . The pain is so severe on some days that I cannot even get out of bed . . . Our house has twice gone into foreclosure proceedings and I have had to borrow from friends and relatives to save it.

Affidavit of George Hinrichs, 43, Minneapolis, Minn., Western Electric employee for 21 years.

> My doctor told me to avoid stress, because otherwise I'd be more likely to have another heart attack. How can I avoid stress when I can't pay my bills or buy food for my family?

Affidavit of Arthur Gottsch, 43.

> My father was originally found to be disabled . . . in January of 1975 . . . He continued to receive disability benefits until August of 1981, when his benefits were terminated. This occurred despite the fact that his problems with his eyesight seemed to have worsened, and he had also developed hypertension. He appealed the termination and he had a hearing before an Administrative Law Judge on April 15, 1982. The day after the hearing my father suffered a severe heart attack and was hospitalized in a

> coma. He died, without having regained consciousness, on June 2, 1982. In the meantime, having been notified of my father's condition, the Administrative Law Judge issued a favorable decision on May 20, 1982. Although I cannot draw a direct connection between my father's death and the loss of his Social Security benefits, such loss clearly did cause him additional strain and anguish, and it certainly was unjustified in light of the fact that his condition had worsened, not changed for the betther. I state these things in the hope that it may help others avoid similar hardship and loss.

Affidavit of Kim Ringold, daughter of Jack Jesperson, deceased.

This undeniable harm to plaintiffs convinces this court that the public interest demands immediate relief. This harm to plaintiffs also far outweighs any injury the Secretary might suffer as a result of the injunction. The Secretary points to bureaucratic woes and inconveniences in administering this order, but this cannot begin to compare with the health and welfare interests of the plaintiffs. The Secretary's alleged and speculative troubles pale even further in view of the fact that it was her own actions which brought the disability program to this juncture of crisis. Justice is only now catching up with her.

In sum, this court finds that plaintiffs have met all of the requirements for a preliminary injunction and now takes on the task of defining the terms of relief appropriate at this stage.

This court is fully cognizant of the deference that must ordinarily be displayed toward the Secretary when acting within her administrative domain. At the same time, however, this court recognizes its duty

to fashion equitable relief commensurate to the harm plaintiffs face. *Califano v. Yamasaki*, 442 U.S. 682, 704, 99 S.Ct. 2545, 2559, 61 L.Ed.2d 176 (1979).

The present circumstances mandate two types of preliminary relief. First, the Secretary must be ordered to employ the proper standards for pain and medical improvement. Second, class members whose benefits have been terminated must be entitled to have their benefits reinstated immediately pending a proper review of their cases, and class members whose initial applications for benefits have been denied under improper standards must be entitled to receive an expedited review of their claims.

Other courts facing similar situations involving the Secretary also have found it necessary to award reinstated benefits to terminated disability claimants. *See, e.g., Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965 (8th Cir.1983); *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.1984). *Mental Health Association of Minnesota* involved a class-action challenge of the Secretary's procedures for evaluating disability claims of the severely mentally ill. The district court concluded that the plaintiffs were likely to prevail on the merits at trial and ordered the reinstatement of benefits. The Eighth Circuit affirmed, finding that the scope of the order was within the district court's jurisdiction:

> The district court merely reinstates certain plaintiffs to their former position; it does not extend a new benefit to those plaintiffs who merely had applied for benefits . . . The resultant order of reinstatement of benefits pending a proper adjudication is a restoration of the status quo.

Mental Health Association of Minnesota, 720 F.2d at 972-73.

Similarly, the present reinstatement order is merely a limited form of relief intended to preserve the status quo of terminated recipients. It does not pronounce that these class members will perpetually receive disability benefits, but only insists that benefits be paid until the Secretary properly reviews each claim on a case-by-case basis. Should the claimant ultimately be found ineligible, benefits paid out pursuant to the terms of the injunction could be recovered by the Secretary under the standard overpayment procedures of the Social Security Act. This order also does not provide to terminated claimants the past-due benefits which they may ultimately be entitled to. There is not the same urgency accompanying the award of past-due benefits as there is with reinstatement of current benefits, upon which plaintiffs rely for daily survival. Thus, back benefits will not be awarded until the Secretary evaluates and finds a continuing disability for each claimant or until this controversy is fully litigated.

The reasonableness of this reinstatement remedy is underscored by a recent action by the Secretary herself. On April 13, 1984, the Secretary announced a moratorium on certain terminations and, accompanying the moratorium, the reinstatement of benefits to some categories of terminated recipients. This indicates that the Secretary recognizes the harm suffered by persons whose benefits have been terminated.

This court realizes that some members of the class whose benefits have been terminated will be entitled to reinstatement under the Secretary's moratorium. There is much confusion, however, as to the exact terms and coverage of the moratorium. The Secretary herself has provided conflicting information, stating at one point that certain class members were

covered only to come back another day and recant. The Secretary also failed to comply with an order of this court to furnish more details on the moratorium. In fact, at the April 26 hearing—two weeks after the "alleged" moratorium—the Secretary still could not explain in any detail the parameters of her moratorium. The one fact that is clear is that many terminated claimants are definitely not covered by the moratorium. The moratorium does not provide for reinstated benefits to persons whose appeals are pending in district court (rather than in the agency), like Plaintiff Polaski, or to persons whose appeals have been remanded to the Secretary by a district court, like Plaintiff Blaschko. In addition, the moratorium will not reinstate benefits to persons whose benefits were terminated following a "diaried" as opposed to a "periodic" review. In order to provide effective relief, this court is left with no alternative but to proceed with this class intact with the understanding, of course, that no one would be entitled to a double payment of benefits.

Class members who have never been awarded disability benefits by the Secretary are not in as strong a position as terminated claimants to seek immediate benefits pursuant to this preliminary injunction. With these first-time applicants, there has never been an agency finding of disability. This court is nonetheless tempted to grant plaintiffs' request for the immediate payment of benefits, at least to claimants with pending district court appeals, because of the Secretary's persistent and obstinate refusal to abide by the law. The Secretary has had a multitude of opportunities to apply the proper standards to these class members, but has continually refused to do so. It is troublesome to contemplate that this again

might be the case if this court remands the claims of this segment of the class and again orders the Secretary to apply the proper law. Reluctantly, however, this court concludes that the Secretary should be given one last chance. The Secretary therefore is directed to evaluate under the proper standards the claims of these first-time applicants within the time periods specified below. Any claimant not receiving this individualized review in the mandated time will be entitled to immediate benefits.

This preliminary injunction includes within its terms of relief class members who have not pursued timely appeals. The fact that appeals were not filed in some cases is not an indication of how meritorious a case the claimants could present. Many claimants believe—after rounds of agency appeals—that further fighting would be futile. Others have been unable to retain attorneys. Affidavit of Arthur Gottsch. And some claimants may be so disabled that they could not perfect timely appeals.

The Secretary, through an affidavit submitted by Jean Hall Hinckley, Acting Deputy Associate Commissioner for Disability, implies that compliance with this order will be virtually impossible. According to Hinckley, it will take at least six months to merely identify "a substantial number" of class members. Hickley Affidavit, at p. 4. This court, in this age of computers, finds this assertion to be preposterous and frightening. Hinckley further states that the agency's problems will be compounded because it "is at present attempting to comply with a number of injunctive orders in major class action lawsuits nationwide." Hickley Affidavit, at p. 4. This only serves to illustrate, once again, that the Secretary herself has brought on many of the difficulties now

facing her. The fact that the magnitude of the Secretary's transgressions has been so overwhelming cannot stand as an argument for delaying remedial action. Instead, it further demonstrates the necessity for effective and immediate relief.

Accordingly, IT IS HEREBY ORDERED That a preliminary injunction be issued as to class members whose benefits have been or will be terminated and that the defendant, her employees, agents and assigns shall be:

1. Enjoined from terminating Title II or Title XVI benefits at any level of the administrative review process unless and until defendant has:

> a. Given timely and effective written notice to the recipient of disability benefits and his authorized representative, if any, of the proper pain and medical improvement standards and of the right to submit additional evidence; and
>
> b. Evaluated the recipient's continuing eligibility for disability benefits under the proper pain and medical improvement standards;

2. Enjoined from terminating disability payments to persons receiving continuing payments pursuant to Pub.L. 97-455 unless or until there has been an adverse decision by an Administrative Law Judge made in accordance with the requirements of paragraph 1, *supra*;

3. Ordered to notify all class members and their authorized representatives, if any, who are currently pursuing administrative or judicial appeals from the termination of their benefits and who are not currently receiving payments, of the proper pain and medical improvement standards, of the right to sub-

mit additional evidence, and of the right to reinstatement of payments.

These benefits shall continue until the Secretary determines, on a case-by-case basis and under the proper standards, that a claimant is not disabled.

For class members whose appeals are pending in district court and who choose reinstatement, their cases shall be remanded to the Secretary for this individualized review under the proper standards. The Secretary shall submit a notice of remand, along with a proposed order of remand, to the district court for each class member who requests reinstatement within 72 hours of claimant's request. These remands are intended to be administrative in nature, a procedural step to facilitate the transfer of cases from courts to the agency for compliance with this order. The Secretary's notice of remand shall state that the remand is being sought pursuant to the claimant's request and this court's injunction, and that immediate court action is requested.

4. Ordered to notify all class members and their authorized representatives, if any, who do not have timely administrative appeals pending of the proper pain and medical improvement standards, the right to have their claims reopened, the right to submit additional evidence, and the right to have payments reinstated;

5. Ordered to reopen the claims of class members whose files are located at the District Offices or at the Appeals Council and to return these files to the DDS for reevaluation under the proper pain and medical improvement standards, whether or not the claimant seeks reinstatement of payments pursuant to paragraph 4, *supra*;

6. It is further ordered that both parties shall submit to the court within five days of the date of

this order proposed notices to be sent by the Secretary to class members pursuant to the terms of this order. This notice shall include information concerning the availability of attorneys under the Social Security Act to assist claimants in their efforts to gain benefits. The Secretary shall mail such notices to class members within fifteen days of the court's approval of the forms. Class members shall be given thirty days to respond to such notices. Except for class members with appeals pending in district courts, the Secretary shall begin paying benefits to any class members requesting reinstatement within fifteen days of the request for reinstatement. For claimants with pending district court appeals, the Secretary shall begin paying benefits to any class members requesting reinstatement within fifteen days of the filing of the district court's remand order.

IT IS FURTHER ORDERED That a preliminary injunction be issued as to class members whose applications have been or will be denied as follows:

1. The the Secretary is ordered to issue a teletype within twenty-four hours of the date of this order notifying all offices of the Social Security Administration to process applications for Title II and Title XVI disability benefits, under the proper pain standard, and to notify the claimant of the proper pain standard if the application is denied;

2. That all class members whose applications have been denied by the defendant at any level of the administrative review process with no appeal pending, or who currently have an administrative appeal pending,

> a. Shall be issued a written notice (with a copy to his legal representative, if any) by the Secretary which contains the following:

i. Asks the applicant whether he alleges he is unable to work in whole or in part because of pain or other subjective complaints;

ii. Informs the applicant of the proper pain standard;

iii. With respect to applicants who do not have a timely appeal pending, states that the applicant has a right, if he so chooses, to have his claim reopened and considered under the proper pain standard, to submit additional evidence, to an expedited decision on his application within a stated time period, and to interim benefits if the Secretary fails to issue a decision within the stated time period;

iv. With respect to applicants who currently have an administrative appeal pending, states that the applicant has a right, if he so chooses, to have his claim considered under the proper pain standard, to submit additional evidence, to an expedited decision on his application within a stated time period, and to interim benefits if the defendant fails to issue a decision within the stated time period.

b. Upon receiving the timely written request from an applicant for an expedited decision, the Secretary shall consider the application under the proper pain standard and shall issue a written decision within the stated time period:

i. For those persons whose applications are pending and/or will be considered at the initial application or the Reconsideration

Level, the stated time period shall be sixty days from the date of receipt of the request for an expedited decision.

ii. For those persons whose applications are pending and/or will be considered at the Administrative Law Judge or Appeals Council level, the stated time period shall be ninety days from receipt of the request for an expedited decision.

c. In those cases in which the defendant has not issued an expedited decision within the stated time period, the Secretary shall commence paying current monthly interim benefits to the applicant from the date the stated time period has expired, and shall continue to pay such benefits until a written decision is issued.

3. That the Secretary shall reopen the claims of class members whose files are located at the District Offices or at the Appeals Council whether or not the claimant responds to the notice referred to in paragraph 2(a)(iii), *supra*. The files located at the District Offices shall be returned to the DDS for evaluation under the proper pain standard, and the files located at the Appeals Council shall be returned to the Office of Hearings and Appeals for evaluation under the proper pain standard.

4. That all class members whose applications have been denied in a final decision by the Secretary and who have requested review by a federal district court,

a. Shall be issued a written notice (with a copy to his legal representative if any) by the Secretary which contains the following:

i. Asks the applicant whether he alleges he is unable to work in whole or in part be-

cause of pain or other subjective complaints;

ii. Informs the applicant of the proper pain standard,

iii. States that the applicant has a right, if he so chooses, to have his claim remanded to the Secretary to be considered under the proper pain standard, to submit additional evidence, to an expedited decision on his application within a stated time period, and to interim benefits if the defendant fails to issue a decision within the stated time period.

iv. Within 72 hours of an applicant's request to have his claim remanded, the Secretary shall submit a notice of remand, along with a proposed order, to the district court. These remands are intended to be administrative in nature, a procedural step to facilitate the transfer of cases from courts to the agency for compliance with this order. The Secretary's notice of remand shall state that the remand is being sought pursuant to the claimant's request and this court's injunction, and that immediate court action is requested.

b. Upon receiving the timely written request from an applicant for an expedited decision, the Secretary shall consider the application under the proper pain standard and shall issue a written decision within thirty days from the date of the filing of the district court's remand order. In those cases in which the defendant has not

issued an expedited decision within the stated time period of thirty days, the Secretary shall commence paying current monthly interim benefits to the applicant from the date the stated time period has expired, and shall continue to pay such benefits until a written decision is issued.

5. Both parties shall submit to the court within five days of the date of this order proposed form notices to be sent by the Secretary to class members pursuant to the terms of this order. This notice shall include information concerning the availability of attorneys under the Social Security Act to assist claimants in their efforts to gain benefits. The Secretary shall mail such notices to class members within fifteen days of the court's approval of the forms. Class members shall be given thirty days to respond to such notices.

IT IS FURTHER ORDERED That as used herein, the "proper medical improvement standard" is as follows:

> Disability may be found to have ceased for medical reasons when there is material improvement in the individual's medical condition, or there was clear and specific error.
>
> Material improvement means that, since the most recent decision, the medically determinable physical or mental impairment(s) which prevented the person from doing substantial gainful activity and entitled him/her to disability benefits has decreased to the point that the person can now perform substantial gainful activity. This improvement must be demonstrated by

medical evidence consisting of signs, symptoms and laboratory findings and must show that either:

a. the impairment(s) itself has decerased, or

b. the effect of the impairment(s) on the person has decreased (for example through drug therapy; however, any negative effects, such as a drug reaction, must be considered).

Clear and specific error means the determination allowing or continuing disability was plainly incorrect; e.g. evidence belonged to another individual, evidence was incorrectly reported or obviously misread. A difference in judgment on a case does not constitute clear and specific error.

IT IS FURTHER ORDERED That as used herein, the "proper pain standard" is as follows:

Disability may be found to exist when there is a medically determinable physical and mental impairment which provides an underlying basis for allegations of pain and other subjective complaints even if there is no objective evidence which explains or supports the degree or severity of the claimant's pain or other subjective complaints.

IT IS FURTHER ORDERED That plaintiffs' motion for a revised class certification is hereby granted.

IT IS FURTHER ORDERED That defendant's motion for a reconsideration of this court's April 17 order is hereby denied.

IT IS FURTHER ORDERED That defendant's motion for summary judgment is hereby denied.

IT IS FURTHER ORDERED That defendant shall furnish a complete copy of this opinion to all of her agents and personnel who will in any capacity act upon this order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-5085MN

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, ETC., APPELLANT

[Filed Dec. 31, 1984]

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby ordered and adjudged that the cause is remanded to the district court with directions for further proceedings consistent with the opinion of this Court.

December 31, 1984

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-5085-MN.

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, ETC., APPELLANT

Appeal from the United States District Court
for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judge Donald R. Ross would have granted the petition.

April 16, 1985

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-5085-MN.

LORRAINE POLASKI, ET AL., APPELLEES

v.

MARGARET M. HECKLER, ETC., APPELLANT

Appeal from the United States District Court
for the District of Minnesota

AMENDED ORDER

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judges Donald R. Ross, John R. Gibson and Pasco M. Bowman would have granted the petition.

April 19, 1985

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

> Judicial review
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this

section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799, provides:

EVALUATION OF PAIN

(a)(1) Section 223(d)(5) of the Social Security Act is amended by inserting after the first sentence the following new sentences: "An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.".

(2) Section 1614(a)(3)(H) of such Act (as added by section 8 of this Act) is amended by striking out "section 221(h)" and inserting in lieu thereof "sections 221(h) and 223(d)(5)".

(3) The amendments made by paragraphs (1) and (2) shall apply to determinations made prior to January 1, 1987.

(b)(1) The Secretary of Health and Human Services shall appoint a Commission on the Evaluation of Pain (hereafter in this section referred to as the "Commission") to conduct a study concerning the evaluation of pain in determining under titles II and XVI of the Social Security Act whether an individual is under a disability. Such study shall be conducted in consultation with the National Academy of Sciences.

(2) The Commission shall consist of at least twelve experts, including a significant representation from the field of medicine who are involved in the study of pain, and representation from the fields of law, administration of disability insurance programs, and other appropriate fields of expertise.

(3) The Commission shall be appointed by the Secretary of Health and Human Services (without regard to the requirements of the Federal Advisory Committee Act) within 60 days after the date of the enactment of this Act. The Secretary shall from time to time appoint one of the members to serve as Chairman. The Commission shall meet as often as the Secretary deems necessary.

(4) Members of the Commission shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Members who are not employees of the United States, while attending meetings of the Commission or otherwise serving on the business of the Commission, shall be paid at a rate equal to the per diem equivalent of the

rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day, including traveltime, during which they are engaged in the actual performance of duties vested in the Commission. While engaged in the performance of such duties away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(5) The Commission may engage such technical assistance from individuals skilled in medical and other aspects of pain as may be necessary to carry out its functions. The Secretary shall make available to the Commission such secretarial, clerical, and other assistance and any pertinent data prepared by the Department of Health and Human Services as the Commission may require to carry out its functions.

(6) The Secretary shall submit the results of the study under paragraph (1), together with any recommendations, to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate not later than December 31, 1985. The Commission shall terminate at the time such results are submitted.

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No. 85-55

In the

Supreme Court of the United States

October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

vs.

LORRAINE POLASKI, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF THE CASE

This action was brought by respondents Lorraine Polaski and Patrick J. Blaschko on behalf of themselves and an Eighth Circuit wide class of disabled persons, challenging certain policies employed by the Secretary of Health and Human Services in administering disability programs under the Social Security Act.[1]

Lorraine Polaksi was originally found eligible for disability benefits under Title II of the Social Security Act in 1979. In July of 1982, she was notified that the Secretary had determined that she was no longer disabled. Ms.

---

[1]Respondents originally challenged the Secretary's policies regarding the medical improvement and pain standards. The challenge to the medical improvement standard was ultimately resolved by a combination of legislation and court of appeals decision, and is not at issue before the Court.

Polaski appealed the termination and appeared at a hearing before an Administrative Law Judge (ALJ) employed by the Social Security Administration. In upholding the termination of Ms. Polaski's disability benefits, the ALJ specifically found that her complaints of pain were credible. He felt constrained to terminate her benefits, however, because the objective medical evidence did not fully support the subjective allegations. Polaski Transcript, 29.

Patrick Blaschko began receiving disability benefits in December, 1975. When his benefits were terminated in 1981, the Secretary refused to give any consideration to Mr. Blaschko's allegations of pain on the grounds that the objective medical evidence in the record did not confirm his subjective complaints. Blaschko Transcript, 15.

Respondents challenged the standard used in evaluating a disability claimant's allegations of pain or other subjective complaints. Respondents acknowledged from the outset of the litigation that the Social Security Act has always required disability claimants to demonstrate the existence of their underlying impairment through the use of objective medical evidence.[2] Respondents contended, however, that neither the Act nor Eighth Circuit case law permitted the Secretary to insist that a disability claimant also demonstrate that the severity of his symptoms was wholly commensurate with the objective medical data in

---

[2]The Social Security Act defines disability as the inability to engage in substantial gainful activity as the result of a "medically determinable physical or mental impairment." 42 U.S.C. §416(i)(1).

order to be found disabled.

The respondents maintained that the Secretary's policies, in particular the following language from Social Security Ruling 82-58, improperly directed disability claims adjudicators to demand that the objective medical evidence fully corroborate a claimant's allegations about the severity of his pain before disability status could be established:

> Once . . . a medical condition (e.g. disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity

> must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss and atrophy. There must be an objective basis to support the overall evaluation of impairment severity. It is not sufficient to merely establish a diagnosis or a source for the symptom. (Emphasis added.)

A long line of Eighth Circuit cases had consistently held that the Social Security Act did not permit the Secretary to require claimants to prove a direct cause and effect relationship between the objective medical evidence and the degree of pain which they suffered.

Respondents claimed that the Secretary's policies regarding pain violated the Social Security Act. They also alleged that the Secretary's policies ignored and conflicted with previous decisions of the Eighth Circuit,

thereby violating the United States Constitution.

The district court issued a class wide preliminary injunction for the respondents. The court determined as a threshold matter that it had jurisdiction over the claims of the entire class under 42 U.S.C. §405(g).

The court then found that the Secretary's pain standard violated the Social Security Act. The court also found that the Secretary's failure to follow established Eighth Circuit precedent regarding the proper standard for evaluation of pain violated the Constitution. Pet. App. 53a.

In reaching this conclusion, the district court pointed to the existence of at least 19 Eighth Circuit opinions clearly setting forth its position on the proper evaluation of pain. Pet. App.

54a.

On appeal to the Eighth Circuit, the Secretary challenged the district court's assumption of jurisdiction over class members who had not fully exhausted their administrative remedies. The Secretary also argued that her official policy regarding the evaluation of pain was in compliance with Eighth Circuit case law.

At oral argument the court encouraged the parties to attempt to reach an agreement regarding the proper pain standard. The parties then entered into an agreement which accurately reflected Eighth Circuit law on the proper evaluation of pain and other subjective complaints. This agreement was incorporated into an order which the Eighth Circuit issued on July 17, 1984. Pet. App. 27a.

In the stipulation which was incorporated into the court's order, the

Secretary conceded that the standard which she was agreeing to was not the standard that had actually been applied in the past by claims adjudicators within the Eighth Circuit. The Secretary admitted that adjudicators had been interpreting the language of Social Security Ruling 82-58 as requiring that allegations of pain be disregarded unless fully corroborated by objective medical findings. The stipulation expressly directed adjudicators in the future to give full consideration to subjective complaints. Pet. App. 29 and 30a. The July 17 order further directed the Secretary to immediately transmit the stipulation to all adjudicators within the Eighth Circuit.

While the case was pending before the Eighth Circuit, Congress passed the Social Security Disability Benefits Reform Act of 1984. The statute included

several provisions concerning the pain standard.[3] In a decision dated December 31, 1984, the Eighth Circuit rejected the Secretary's argument that the Disability Benefits Reform Act superceded the stipulation set forth in its July 17 order regarding the proper standard for the evaluation of pain.

The court found that the pain standard enunciated in the July 17 order was entirely consistent with the standard adopted by Congress in the Disability Benefits Reform Act and would consequently remain in effect in the Eighth Circuit.

---

[3]Pub. L. No. 98-460, 98 Stat. 1794 (1984). The statute contained language describing the factors to be considered in evaluating disability claims based on pain. This provision is to be effective until January 1, 1987. The statute also created a commission to study the subject of pain and directed the commissioner to report back to Congress by December 31, 1985.

In making this determination, the court relied on a) the legislative history of the statute, which stated that the Reform Act was intended to codify current Social Security Administration policy on the evaluation of pain, and b) the express declarations of the Secretary in her briefs that the stipulated agreement was a clarification of existing agency policy in the area. Pet. App. 16a-17a.

The court also upheld the district court's finding that jurisdiction existed under 405(g) over all members of the class regardless of whether or not they had exhausted their administrative remedies. In order to ensure that all members of the class would have an opportunity to have their allegations of pain evaluated under the correct standard, the court required the Secretary to reconsider the claims of those pain class

members whose cases were last evaluated prior to issuance of the July 17 order. Pet. App. 24a.

The Secretary has asked this Court to review the Eighth Circuit's decision on jurisdiction. She has not appealed the lower court's decision on the merits regarding the pain standard. The stipulation contained in the July 17 order remains in effect throughout the Eighth Circuit.

REASONS FOR DENYING THE PETITION

This case does not raise substantial questions appropriate for Supreme Court review. The Eighth Circuit's decision on jurisdiction does not conflict with Supreme Court precedent.

Moreover, the impact of the decision is limited. The specific pain standard contained in the July 17 order has been applied in all cases within the Eighth Circuit raising allegations of pain which

have been processed since that date, and will continue to be applied to pain claims within the Eighth Circuit in the future. The court's assumption of jurisdiction over all class members, therefore, provides the opportunity for reconsideration of their claims to a relatively small group of individuals; namely, those pain class members whose disability benefit claims were last reviewed prior to issuance of the Eighth Circuit's order of July 17, 1984.[4]

---

[4]As the Eighth Circuit noted in its December 31, 1984 opinion, the district court carefully tailored the class here to include only those individuals who received an adverse decision from the Secretary within 60 days prior to the filing of the complaint. Pet. App. 23a. Thus, this case does not present the issue of whether or not the 60 day requirement of §405(g) is jurisdictional or a statute of limitations, as do several other cases which are currently pending before the Court.

Respondents believe that the Secretary's petition for certiorari in this matter should be denied. In the alternative, as the Secretary suggests in her petition, the Court should hold this case for disposition in light of its disposition or decision in Heckler v. City of New York, petition for cert. pending, No. 84-1923 (filed June 7, 1985), and Heckler v. Owens, appeal docketed, No. 84-1905 (June 5, 1985) Pet. 13, 16.

A. The Eighth Circuit's Decision on 405(g) Jurisdiction Does Not Conflict With Supreme Court Precedent.

The Eighth Circuit's decision in this case finding jurisdiction over members of the class who have not fully exhausted their administrative remedies does not conflict with the decisions of this Court in Weinberger v. Salfi, 422

U.S. 749 (1975), Mathews v. Eldridge, 424 U.S. 319 (1976) or Heckler v. Ringer, __ U.S. __, 104 S.Ct. 2013 (1984). The Eighth Circuit's assumption of jurisdiction was entirely consistent with previous decisions of this Court on the question of jurisdiction under §405(g) of the Social Security Act.

The Secretary has misstated the holdings of Salfi, Eldridge, and Ringer. The Court has not held that waiver is appropriate only where the precise set of facts found in Salfi or Eldridge are present. To the contrary, these three cases, when read together, suggest a flexible approach to waiver in which decisions must be made on a case by case basis.

There are two prerequisites to a finding of jurisdiction under 42 U.S.C. §405(g). Mathews v. Eldridge, 424 U.S. 328 (1976). The first calls for

presentment of a claim to the Secretary. This requirement cannot be waived. The Secretary does not allege that respondents in this case fail to meet the presentment requirement.

The second prerequisite to jurisdiction under §405(g) is the requirement that plaintiffs exhaust their administrative remedies before seeking relief from the courts; judicial review is generally limited to situations where there has been a "final decision of the Secretary made after a hearing to which he was a party." Unlike the presentment requirement, however, the exhaustion requirement can be waived either by the Secretary, or, in appropriate circumstances, by the court. Eldridge, supra, 330.

This Court held in Mathews v. Eldridge that the determination of whether or not waiver is appropriate is

essentially a balancing test: "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330. This basic principle was reaffirmed in Ringer: "in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." Heckler v. Ringer, __ U.S. __, 104 S.Ct. at 2023.

This Court also stated in both Mathews v. Eldridge and Heckler v. Ringer that in evaluating the question of waiver courts should look to a number of factors, including, most importantly, the existence of collateral issues and the potential for irreparable harm. Heckler v. Ringer, __ U.S. __, 104 S.Ct. 2013

(1984); Mathews v. Eldridge, 424 U.S. 319 (1984).

Eldridge emphasized that the "core principle" regarding waiver of exhaustion is that "statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." Mathews v. Eldridge, 424 U.S. 332 n. 11 (1976). The Eighth Circuit correctly considered the factors suggested by the Court and applied the Court's flexible, pragmatic approach to waiver to the facts of this case.

The main thrust of the Secretary's argument is that in light of the Court's recent decision in Heckler v. Ringer, respondents'claims here are not sufficiently collateral to their underlying claim for disability benefits to justify waiver. Pet. 13. This argument distorts

the nature of the claim in Ringer and ignores the fundamental distinction between that claim and the questions raised by respondents in this case.

In the first place, Ringer did not alter the basic law on exhaustion. The Court in Ringer merely found that, given certain characteristics of the plaintiffs' claims -- characteristics which are not present in this case -- waiver of the exhaustion requirement was not appropriate.

Ringer involved a challenge to the Secretary's refusal to cover BCBR surgery -- a technique performed to relieve respiratory distress -- under the Medicare Act. Plaintiffs alleged that the Secretary had a constitutional and statutory obligation to provide payment for BCBR surgery. This Court found that plaintiffs' challenge to the Secretary's

procedures was equivalent to a claim that they should be paid for their BCBR surgery. The Court found the procedural claims to be "inextricably intertwined " with the plaintiffs' claim for reimbursement. This was so because following a declaration that BCBR surgery is a covered service, "only essentially ministerial details will remain before respondents would receive reimbursement." Heckler v. Ringer, __ U.S. __, 104 S.Ct. at 2022.

The situation in this case is quite different. The relevant challenge here involved the procedures which the Secretary uses to evaluate disability claimants' allegations of pain and other subjective complaints. Successful resolution of this claim does not resolve the underlying issue of eligibility for benefits. Here, unlike in Ringer, success on the merits does not automatically or

necessarily lead to the payment of disability benefits.

Respondents have sought to have their entitlement to benefits determined by the Secretary in accordance with proper standards. However, the eligibility of class members for these disability benefits remains an open question to be determined in individual cases by the Secretary. Respondents' claims in this case are collateral within the meaning of the Ringer decision because the relief which they have sought in no way predetermines their entitlement to benefits.

In assuming jurisdiction here over class members who have not fully exhausted their administrative remedies, the Eighth Circuit was simply recognizing this crucial distinction, as had the Second Circuit earlier in its decision in City of New York v. Heckler, 742 F.2d 729

(2d Cir. 1984), pet. for rehearing denied, 755 F.2d 31 (2d Cir. 1985). The Tenth Circuit and the Seventh Circuit have recently reached the same conclusion. Reed v. Heckler, 756 F.2d 779 (10th Cir. 1985); Johnson v. Heckler, No. 85-1254 (7th Cir., July 30, 1985), aff'g 607 F.Supp. 875 (N.D. Ill. 1984).

Johnson v. Heckler was a case challenging the Secretary's regulations involving the sequential evaluation of claims for disability benefits under the Social Security Act. The Johnson court affirmed the district court's inclusion in the class of individuals who had not exhausted their administrative remedies. In doing so, the court distinguished between the plaintiffs in Ringer, who were, "at bottom," simply seeking reimbursement for BCBR surgery, and the plaintiffs in Johnson, who like the plaintiffs in this case, would not be guaranteed benefits

even if they prevailed on their statutory and constitutional claims. The Seventh Circuit found that under these circumstances "the plaintiffs' claims are sufficiently collateral to their benefit claims to justify waiver." Johnson, Slip. Op. at 9.

The Secretary also maintains that respondents have not demonstrated that class members are likely to suffer irreparable harm if exhuastion is not waived. Pet. 13.

In making this argument, the Secretary ignores the clear finding of the Eighth Circuit that class members do face irreparable harm when their claims are not processed under proper standards. She also misreads the holdings in Mathews v. Eldridge and Heckler v. Ringer regarding irreparable harm.

The court below specifically affirmed the district court's finding on irreparable harm:

> The district court found, and we agree, that the plaintiffs face potentially irreparable harm. In the district court's words,
>
> > It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing -- all of which aggravates their medical conditions.

Pet. App. 20 and 21a.

Moreover, the Secretary errs in attempting to characterize the harm suffered by the class here as somehow distinct from that suffered by the plaintiff in Eldridge. Pet. 13. Lower courts have consistently relied on Eldridge to find

irreparable harm in situations that are entirely analagous to that presented here. These courts have routinely recognized that disability benefit claimants who challenge the validity of procedures used to evaluate their claims do face potentially irreparable harm that cannot adequately be compensated by a subsequent retroactive award of benefits. Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 345 (3rd Cir. 1977); Mattern v. Mathews, 582 F.2d 248, 253 (3rd Cir. 1978); Caswell v. Califano, 583 F.2d 9, 14 (1st Cir. 1978); Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983); Avery v. Heckler, 584 F.Supp. 312, 319 (D. Mass. 1984), aff'd on other grounds, 762 F.2d 158 (1st Cir. 1985); Holden v. Heckler, 584 F.Supp. 463, 482, 499 (N.D. Ohio 1984).

The Secretary also claims that irreparable harm cannot exist here because the administrative review process set up by Congress assumes that where claims are erroneously denied during that process a later award of accrued benefits will always provide adequate compensation for the error. Pet. in Heckler v. City of New York, 22. In making this argument the Secretary misconstrues the decisions in Eldridge and Ringer.

Neither Ringer nor Eldridge stand for the proposition that disability benefit claimants who challenge the procedures used to evaluate their claims are in the same position vis a vis irreparable harm as claimants whose only challenge is to the substantive merits of the adjudication. If that were the case, the concept of irreparable harm in the exhaustion context would be meaningless.

Indeed, the statement in Ringer that "Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention . . ." Heckler v. Ringer, __ U.S. __, 104 S.Ct. at 2028, recognizes that there will be situations where the balance must be struck in favor of judicial intervention. Intervention is not either overly casual or premature where there are collateral claims. It is in precisely those situations where claimants challenge the procedural evaluation scheme, as opposed to the ultimate decision on the merits, where exhaustion should not be required.

The Eighth Circuit decision waiving the exhaustion requirement does not conflict with Supreme Court precedent. The Eighth Circuit waived exhuastion, where

the Court in Ringer did not, because the factual circumstances in this case differed in significant respects from those in Ringer. The same legal standard was applied in both instances. Differing results are to be expected where the facts to which the legal standard applies vary. The Court cannot, and should not, accept review each time a lower court decides to waive the exhaustion requirement. This case simply does not present the kind of significant policy question appropriate for resolution by the Court.

B. The Eighth Circuit Was Justified in Assuming Jurisdiction Over all Class Members.

The court of appeals was correct when it found that deference to the Secretary's exhaustion requirement was not necessary and consequently assumed jurisdiction under 405(g) over all

members of the class.

Deference to the Secretary was especially inappropriate in this case because respondents' complaint below raised the constitutional claim of non-acquiescence regarding the Secretary's failure to follow the proper standard in evaluating allegations of pain. The district court's decision in respondents' favor on the pain issue was based on non-acquiescence grounds; this decision was not reversed by the Eighth Circuit.

The non-acquiescence claim is one which the Secretary is uniquely incapable of resolving through the administrative process. Under these circumstances it serves no useful purpose to insist on a final administrative decision from the Secretary before permitting judicial review. For this reason the situation here is analagous to that in Weinberger

v. Salfi, 422 U.S. 749 (1975), and waiver was entirely appropriate.

The Secretary asserts that the Eighth Circuit's assumption of jurisdiction was especially unwarranted because, she claims, the court below endorsed her "overall approach" to the evaluation of complaints of pain and therefore had no basis upon which to assume that a significant percentage of disability claims involving pain had been decided incorrectly. Pet. 14. Nothing could be further from the truth. In fact, the court expressed its strong disapproval of the Secretary's approach to claims alleging pain in finding that waiver of exhaustion was appropriate. Pet. App. 21a.

Over the course of the past several years the Eighth Circuit has repeatedly taken the Secretary to task for her improper handling of disability claims

involving allegations of pain or other subjective complaints. When respondents filed their lawsuit in April of 1984, there were at least 19 reported Eighth Circuit cases in which the court had felt it necessary to emphasize that the Secretary was not free to reject a claimant's subjective complaints of pain simply because they were not fully corroborated by the objective medical evidence. Pet. App. 38a.

Time after time, the court expressed its frustration in these cases with the fact that agency adjudicators were applying the wrong standard to claims involving pain:

> For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain. The Secretary must give consideration to subjective complaints of pain and may not disregard them solely because they are not fully

> corroborated by the objective medical evidence.

Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983). See also Pet. App. 55a.

In determining that deference to the Secretary was not appropriate in this case, and that consequently waiver of the exhaustion requirement was justified, the court noted that "In 1984 alone, we reversed or remanded to the Secretary because of inadequate consideration of pain in at least 12 cases, while affirming the Secretary's analysis of pain or other subjective complaints in none." Pet. App. 21a. The court commented that this high reversal rate "fortifies our decision to waive exhaustion in light of the potentially irreparable harm incurred by plaintiffs as a result of this procedural irregularity." Pet. App. 22a, citing Mental Health Association of Minnesota v. Heckler, 720 F.2d at 970.

Moreover, the Secretary conceded in the stipulation that was incorporated into the July 17 order that agency adjudicators had not been applying the correct pain standard in their day to day work evaluating claims. Pet. App. 11a. It is significant in this regard that the Secretary did absolutely nothing to ensure that agency adjudicators understood and applied the appropriate pain standard until pressured to do so by the court.

This was clearly not a situation involving the sort of "isolated errors" that the Secretary could be relied upon to correct on her own initiative. Pet. 14; Weinberger v. Salfi, 422 U.S. 766 (1975). The court below had every justification, based on its past experience and on the Secretary's own admissions, for finding that, prior to entry of its July 17, 1984 order, claims involving

pain or other subjective complaints were routinely handled improperly by adjudicators at every level of administrative review. Under these circumstances deference to the agency was undoubtedly not required.

C. The Conflict Between the Eighth Circuit and the Fourth Circuit Does Not Warrant Supreme Court Review.

The Fourth Circuit has found that class members challenging the Secretary's policies regarding the evaluation of diabetes, pain and hypertension in that circuit must fully exhaust their administrative remedies before seeking judicial review. Hyatt v. Heckler, 757 F.2d 1455, 1460 (4th Cir. 1985). While the Fourth and Eighth circuits have reached different conclusions about the appropriateness of waiver, their disagreement does not represent a conflict

which is significant enough to warrant Supreme Court review.

The circuits do not disagree over the relevant legal issues. Both circuits recognize the fundamental principles that govern decisions on exhaustion. The courts differed in their application of the facts to the law, not over those fundamental principles.[5] For this reason, the conflict here does not provide evidence of a dispute over a substantive policy issue.

Moreover, because the decisions do not break any new ground regarding the law on exhaustion, they are unlikely to have a significant impact on cases

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[5]The Fourth Circuit decided against waiver because it felt that plaintiffs' claims were "inextricably intertwined" with their underlying claims for benefits, while the Eighth Circuit found that the procedural claims were sufficiently collateral to the claims for benefits to justify waiver.

decided in the future. These two decisions are unique to the facts of the cases themselves, and will affect only the litigants who are directly involved in the actions.

D. <u>There Are No Other Reasons to Grant Review</u>.

The Secretary asserts, as her final argument in support of her petition, that the Eighth Circuit's assumption of jurisdiction in this case permitted it to rule prematurely on the pain standard contained in the Disability Benefits Reform Act. The Secretary asserts that, if the court had refused to waive the exhaustion requirement, the pain claim would have been dismissed, permitting the Secretary time to interpret the new standard in the first instance. Pet. 16. There are serious flaws in this reasoning.

As a threshold matter, it is important to note that the Secretary has not sought review of the Eighth Circuit's judgment that the July 17, 1984 order is consistent with the Reform Act.

Secondly, the Secretary is wrong in saying that the court's refusal to waive the exhaustion requirement would have resulted in dismissal of the pain claim.

Even if the court had found that it did not have jurisdiction over class members who had failed to exhaust their administrative remedies it would have continued to possess jurisdiction over the claims of named plaintiffs Lorraine Polaski and Patrick Blaschko, as well as over all other class members who had fulfilled the exhaustion

requirement.[6]

Contrary to the Secretary's assertions, the claims of the named plaintiffs regarding the pain issue were not automatically resolved by remand to the Secretary. The question of whether or not the terms of the court's July 17, 1984 order should be applied upon remand remained very much alive, especially in light of the Secretary's claim that this order was invalidated by passage of the Reform Act.

Nor is the Secretary correct in asserting that the court of appeals has acknowledged that all unnamed class members had not exhausted their administrative remedies. Pet. 15 n. 9. The

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[6]In addition to the named plaintiffs, the class would then have included individuals with pending judicial appeals and individuals who had exhausted their administrative remedies within the 60 days prior to the filing of the complaint.

statement on which the Secretary relies, found at page 19a of Petitioner's Appendix, refers only to those claimants "whose disability claims were denied by the Secretary but who at the time of certification were still pursuing administrative appeals, or if not pursuing administrative appeals, were not time barred from doing so." Pet. App. 18a. Earlier, the court had specifically directed that the claims of other unnamed class members were to be decided in accordance with the court's order. Pet. App. 18a.[7]

Similarly, the Secretary has no basis for arguing that, if the Court grants the petition for a writ of

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[7]The first sentence at the top of page 18a should read "Other unnamed plaintiffs raising the pain issue . . .." The court's original opinion contained an error. See Respondents' Appendix 1a.

certiorari in this case, it should vacate the judgment below regarding the pain standard. Pet. 17. The court's jurisdiction over the claims of the named plaintiffs and other class members who did exhaust their administrative remedies is clear. Since the Secretary has not requested review of the substance of the Eighth Circuit's decision regarding the effect of the Disability Benefits Reform Act on the July 17, 1984 order, there would be no basis for vacating the judgment as to pain even if the Court were to ultimately decide that the court below improperly assumed jurisdiction over a portion of the class.

CONCLUSION

The Secretary's petition for certiorari in this matter should be denied. In the alternative, the Court should hold this case for disposition in

light of its disposition or decision in Heckler v. City of New York and Heckler v. Owens.

Respectfully submitted,

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Mary G. Grau
M. Francesca Chervenak
Mark A. Bohnhorst
Steven Moon
Martha Eaves

ATTORNEYS FOR RESPONDENTS

September, 1985

RESPONDENTS' APPENDIX

M E M O R A N D U M

TO: All Counsel of Record

FROM: Robert D. St. Vrain, Clerk of Court, USCA8

DATE: March 18, 1985

RE: 84-5085 Lorraine Polaski, et al v. Margaret M. Heckler, etc.

Enclosed herewith please find corrected pages 15 and 19 in the referenced opinion of this Court filed on December 31, 1984. Please correct your opinion by inserting the enclosed pages.

cc. Honorable Gerald W. Heaney
Honorable John R. Gibson
Honorable George G. Fagg
Slip Opinion Subscribers
All Publishing Companies

Other unnamed plaintiffs raising the pain issue (but not the issue of medical improvement) have cases pending before this Court or district courts within the Circuit. These cases should be decided in accordance with this opinion by the courts having jurisdiction of the cases. Cases may be remanded to the Secretary where substantial evidentiary questions remain.

The clas as certified also includes claimants whose disability claims were denied by the Secretary but who at the time of certification were still pursuing administrative appeals, or if not pursuing administrative appeals, were not time barred from doing so. As to these claims, the district court concluded that a waiver of the requirement of exhaustion was appropriate in this case. This is the most difficult issue in this appeal. The Secretary argues that the Court does

not have jurisdiction over these cases and so must vacate this portion of the district court's preliminary injunction. The plaintiffs contend that the Court does have jurisdiction under the Social Security Act, 42 U.S.C. § 405(g) (1982), and the mandamus statute, 29 U.S.C. § 1361 (1982). We find that the Court does have jurisdiction over these claims and that this carefully defined section of the class is entitled to relief:

Section 405(g) provides that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides * * *.

This section involves several elements: (1) the individual must have presented a claim for benefits to the Secretary, and (2) the individual must have exhausted the administrative remedies

decided since July 17, 1984, will have their claims re-decided under the proper pain standard. Those class members whose claims were decided before this date have not received this relief. This result is not only unfair, but if permitted, would diminish the Court's authority to direct uniform and equitable relief in class actions.

Fourth, in light of the relief sought by the plaintiffs, deferring to the agency is both unnecessary and inappropriate. At this point in the proceedings no further elaboration of agency policy is likely. The parties' stipulation on pain and the 1984 Act have resolved the controversy over the appropriate standard. All that remains is to give these class members a chance to have their complaints of disabling

pain evaluated under the correct standard.

Finally, the plaintiffs' claims are admittedly not "wholly collateral" to their claims for benefits, as was true in Eldridge. But the focus of their relief as a class--the Secretary's compliance with our case law and the 1984 Act--is substantially collateral to the issue of whether they are in fact disabled and entitled to benefits. See City of New York v. Heckler, slip op. at 6028-29; Mental Health Association of Minnesota v. Heckler, 720 F.2d at 971.[3]

The district court narrowly tailored the class to meet the sixty-day requirement of section 405(g). Only

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[3]In light of our conclusion that there is jurisdiction under section 405(g), it is unnecessary for us to consider whether the mandamus statute provides an alternate basis for jurisdiction.

those class members who received an adverse decision from the Secretary within sixty days prior to the filing of the relevant class actions are entitled to relief here.[4]

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[4]The class members are those as described above who received an adverse decision within the following time periods:

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-55 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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v.

LORRAINE POLASKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents' attempt to justify the exercise of jurisdiction by the courts below over the claims of thousands of class members who did not exhaust their administrative remedies is without merit. The underlying issue respondents have raised in this case concerns the weight that the state agency or an administrative law judge (ALJ) should give to a particular class member's subjective allegations of pain in determining whether he is disabled. Respondents therefore challenge the interlocutory resolution of the merits of each class member's entitlement to disability benefits. This Court's decisions make clear, however, that a person may obtain judicial review under 42 U.S.C. 405(g) with respect to an issue that bears on the merits of his claim for benefits only after he has fully exhausted his administrative remedies through the Appeals Council stage. The courts below thus plainly had no authority to grant relief to any

individual who did not personally satisfy this jurisdictional prerequisite.

The exhaustion issue in this case is essentially identical to that presented in *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and it also is related to the exhaustion issue presented in *Heckler* v. *Owens*, appeal pending, No. 84-1905. We have suggested in the petition for a writ of certiorari (at 12-13, 16) that plenary review is not required in this case as well and that the petition instead should be held and disposed of in light of the Court's ultimate disposition in *City of New York* and *Owens*. Respondents agree (Br. in Opp. 13) that plenary review is unnecessary here and that the petition should be held pending a disposition in those cases if the Court does not deny certiorari. Accordingly, we shall respond only briefly to the points raised by respondents.

1. Respondents contend (Br. in Opp. 11-12) that the impact of the decision below is "limited" because it affects only a "relatively small group of individuals." This is a remarkable assertion. The judgment below requires the Secretary to provide for the reopening of approximately 9,000 cases. See Pet. 12. When this burden is added to that imposed by similar readjudication orders in numerous other class actions involving thousands of claimants who likewise abandoned their claims for benefits, the magnitude of the judicial intrusion into the administration of the Social Security disability programs is enormous.

2. Contrary to respondents' contention (Br. in Opp. 15-27), the case-by-case balancing approach to the exhaustion issue they advocate finds no support whatever in this Court's decisions in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14-16. The Court in *Eldridge* and *Ringer* simply recognized a narrow exception to the requirement of

full exhaustion for circumstances in which the claimant raises a legal issue that is "entirely collateral" to his substantive claim for benefits and that would be lost (and thereby cause irreparable injury) if judicial review were postponed until after a "final decision" on the merits of his claim for benefits. As we have explained in the petition for a writ of certiorari (at 20-22) in *City of New York*, that exception plainly has no application with regard to an issue, such as the manner for evaluating complaints of pain, that directly affects the merits of a claimant's entitlement to benefits.

3. Respondents' contention (Br. in Opp. 27-33) that the Eighth Circuit correctly dispensed with the exhaustion requirement because the Secretary had "nonacquiesced" in circuit precedent regarding the evaluation of pain is misleading. The court of appeals made no finding of nonacquiescence, and the agreement between the parties regarding the appropriate standards for evaluating pain, which was approved by the court on July 17, 1984 (Pet. App. 27a-31a), made it unnecessary for the court even to address that question (*id.* at 3a). Moreover, the Secretary has maintained throughout this litigation that her position regarding the evaluation of pain under prior law was fully consistent with Eighth Circuit precedent, and the agreement approved by the court of appeals on July 17, 1984 in fact reflected the Secretary's view of the law (*id.* at 28a, 31a). These circumstances refute any suggestion that the Secretary had adopted an official policy of "nonacquiesing" in Eighth Circuit precedent concerning the evaluation of pain.

Contrary to the impression respondents seek to convey (Br. in Opp. 8, 32), it also is clear that the Secretary did not concede that an incorrect standard for the consideration of pain had been generally applied in administrative proceedings on the class members' claims. The July 17, 1984 agreement, in which respondents concurred, stated only that "some adjudicators" had misinterpreted the formal Social

Security Ruling on the subject of pain. See Pet. App. 29a. The fact that an error might have been committed in some individual cases scarcely furnishes a basis for the courts below to require that the Secretary provide for the reopening of *all* prior decisions in which the claimant alleged that he experienced pain.

4. Respondents concede (Br. in Opp. 33-35) that the decision below conflicts with the Fourth Circuit's decision in *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (1985), petition for cert. pending, No. 85-474 (filed Sept. 19, 1985). But respondents argue that this conflict does not require resolution by this Court because, in their view, the two courts of appeals agreed on the legal test to be applied and disagreed only in its application. This is plainly incorrect. The Fourth Circuit in *Hyatt* expressly held that exhaustion could not be dispensed with under the exception recognized in *Eldridge* and *Ringer* unless the legal issue involved is "wholly" collateral to the class members' claims for benefits, while the Eighth Circuit in this case held that the legal issue need not be wholly collateral in order for a court to dispense with the exhaustion requirement under *Eldridge* and *Ringer*. See Pet. App. 23a. The petitioners in *Hyatt*, unlike respondents herein, argue that resolution of this conflict is warranted. See 85-474 Pet. 17-18 n.14, 22. We agree, but in our view *City of New York* and *Owens* are fully adequate vehicles for that purpose.

5. Finally, respondents disagree (Br. in Opp. 35-39) with our submission (Pet. 14-15, 16) that the Court should vacate the judgment of the court of appeals, except insofar as that judgment remanded the cases of the terminated class members to the Secretary pursuant to Section 2 of the Social Security Disability Benefits Reform Act of 1984 (1984 Act), Pub. L. No. 98-460, 98 Stat. 1794. The disposition we suggest would have the salutary effect of vacating the court of appeals' construction of Section 3 of the 1984

Act (98 Stat. 1799), which addressed the question of the manner in which pain should be evaluated. See Pet. 10; Pet. App. 14a-17a. The Secretary should first be given the opportunity to interpret and apply that new statutory provision, either by regulation or in the course of the adjudication of individual claims, before a court presumes to impose its own construction.

Respondents maintain (Br. in Opp. 36-37) that the court of appeals properly could consider the interpretation of the new pain standard in Section 3 of the 1984 Act in connection with its consideration of the claims of the two class representatives, Polaski and Blaschko, because these two claimants at least had exhausted their administrative remedies. What respondents ignore, however, is that Polaski and Blaschko both were persons whose benefits had been terminated and who therefore were covered by the special remand provisions in Section 2 of the 1984 Act and by the court of appeals' remand order pursuant to that Act. See Pet. 5 n.3, 9, 15 n.9. Any question concerning the evaluation of pain in the cases of Polaski, Blaschko or other class members whose benefits were terminated therefore must first be raised in the course of administrative proceedings under Section 2 of the 1984 Act. See Supplemental Brief for the Secretary (at 9 n.9) in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984). There has been no finding that any class members *other* than Polaski or Blaschko exhausted their adminsistrative remedies (see Pet. App. 19a), except for those claimants who might have filed their own individual actions under 42 U.S.C. 405(g) (see Pet. App. 18a; Br. in Opp. 38). As to the latter claimants, however, the pain issue should be considered in their individual actions under 42 U.S.C. 405(g), not in this class action in which there is not even a class representative by virtue of the mandatory remand of the cases of Polaski and Blaschko.

Particularly in the absence of any remaining class representative, this class action should not be permitted to proceed. This suit was filed to challenge the evaluation of pain under *prior* law, which has now been replaced by Section 3 of the 1984 Act. The court of appeals' peremptory efforts to give a binding judicial interpretation to the new pain provisions in the 1984 Act that the Secretary has not yet had an opportunity to interpret and apply should not be permitted to have controlling effect in the Eighth Circuit.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, the petition in this case should be held pending the Court's disposition in *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and *Heckler* v. *Owens*, appeal pending, No. 84-1905. If the Court subsequently grants the petition in light of its disposition in those cases, it should vacate the judgment below and remand with instructions to dismiss the complaint, except insofar as the judgment of the court of appeals already has ordered the remand to the Secretary of the cases of those class members whose benefits were terminated and who therefore were covered by Section 2 of the Social Security Disability Benefits Reform Act of 1984.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985